A

TREATISE

OF

EQUITY.

In Six Books.

Under the following HEADS:

(*Divided into Chapters.*)

1. Of the Nature of EQUITY, and of AGREEMENTS in GENERAL.
2. Of USES and TRUSTS.
3. Of MORTGAGES and PLEDGES.
4. Of LAST WILLS and TESTAMENTS.
5. Of DAMAGES and INTEREST.
6. Of EVIDENCE.

By the late LORD CHIEF BARON GILBERT.

Jus ſtrictum quatenus opponitur Æquitati jus eſſe negamus, ſed ita dici Æquivoce, ut Hominem pictum Hominem dicimus.

Grot. de Æquit.

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A TREATISE

A TREATISE OF EQUITY.

BOOK I.

CAP. I.

Of the Nature of Equity, and of Agreements in General.

Sect. 1. IT is plain that law is a moral ſcience; ſince the end of all law is juſtice. And juſtice, in the moſt extenſive ſenſe of the word, differs little from virtue itſelf; for it includes within it the whole circle of virtues. Yet the common diſtinction betwixt them is, that the ſame, which conſidered poſitively, and in itſelf, is called virtue, when conſidered relatively, with reſpect to others, has the name of juſtice. But juſtice in a proper and limited ſenſe, as being itſelf a part of virtue, is confined to things ſimply good or evil; and conſiſts in a man's taking ſuch a proportion of them as

Law & Juſtice diſtributive & comutative.

he ought. And this is uſually divided into two ſorts; the one diſtributive, of things to be divided, amongſt thoſe who are united in civil ſociety; the other commutative, or that which governs contracts. The reaſon of this difference is, that in the one reſpect is had of the perſons, but in the other only of the damage done. For it is the office and duty of a judge to make an equality between the * parties, that no one may be gainer by another's loſs. But in diſtributive juſtice the ſame equality is required in both; that neither equal perſons have unequal things, or unequal perſons things equal. And it is this golden rule of equality, that God himſelf obſerves, in the diſtribution of the ſeveral parts of the world, dealing to every one according to his deſerts: As in muſick, the beſt inſtruments are given to thoſe who play beſt. And the ſame order ought to be obſerved in ſtates, if they would be truly happy, taking God and nature for their pattern; that they may be of a piece and conſiſtent with the reſt of the univerſe.

* P. 2.

Sect. 2. But our preſent enquiry is reſtrained to that firſt ſort of juſtice, which governs contracts. For as an action or ſuit, which is the remedy the law hath provided for the obtaining juſtice, is but a legal demand of ſome right, and all civil rights muſt ariſe from obligations, and theſe obligations are founded on compacts, it follows of neceſſity, that the proper ſubject of law is contracts, and that juſtice the chief end of law, which teaches the performance of them. Now contracts are either voluntary or involuntary. The voluntary are, buying and ſelling, letting and hiring, depoſits, the intereſt of money and the like. The involuntary are, theft, murder, rapine, and all other heinous offences, whether ſecret or violent. But we ſhall wave the treating of theſe any further here; ſince it is the voluntary contracts only, that we

we ſhall have occaſion to ſpeak of, and ſuch eſpecially as are moſt in uſe amongſt us. For of torts and crimes Chancery has no proper juriſdiction, and we do not intend to confine our diſcourſe to the municipal laws only, but to have chiefly in view that natural juſtice and equity, which ought to be the ground-work and foundation of all law, and which corrects and controls them when they do amiſs.

Sect. 3. Equity therefore, as it ſtands for the whole of natural juſtice, is more excellent than any human inſtitution; neither are poſitive laws, even in matters ſeemingly indifferent, any further binding, than they are agreeable with the law of God and nature. But the precepts of the natural law, when enforced by the laws of man, are ſo far from loſing any thing of their former excellence, that they receive an additional ſtrength and ſanction. Yet as the rules of the municipal law are finite, and the ſubject of it infinite, there will often fall out caſes, which cannot be determined by them; for there can be no finite rule of an infinite matter, perfect. * So that there will be a neceſſity of having recourſe to the natural principles; that what was wanting to the finite, may be ſupplied out of that which is infinite. And this is what is properly called equity in oppoſition to ſtrict law; and ſeems to bear ſomething of the ſame proportion to it in the moral, as art does to nature in the material world. For as the univerſal laws of matter would in many inſtances prove hurtful to particulars, if art were not to interpoſe and direct them a-right; ſo the general precepts of the municipal law would oftentimes not be able to attain their end, if equity did not come in aid of them. And thus in Chancery every particular caſe ſtands upon its own particular circumſtances; and altho' the common law will not decree againſt the general

* P. 3.

1 Chan. Caſ. 91.

rule of law, yet Chancery doth, ſo as the example introduce not a general miſchief. Every matter therefore, that happens inconſiſtent with the deſign of the legiſlator, or is contrary to natural juſtice, may find relief here. For no man can be obliged to any thing contrary to the law of nature, and indeed no man in his ſenſes can be preſumed willing to oblige another to it. But if the law has determined a matter with all its circumſtances, equity cannot intermeddle; and for the Chancery to relieve againſt the expreſs proviſion of an act of parliament, would be the ſame as to repeal it. Equity therefore will not interpoſe in ſuch caſes, notwithſtanding accident or unavoidable neceſſity. So that infants had been bound by the ſtatute of limitations, if there had been no exception in the act. And altho' in matters of apparent equity, as fraud, or breach of truſt, precedents are not neceſſary; yet in other caſes, it is dangerous to extend the authority of this court further than the practices of former times.

Sect. 4. Now the ſubject matter both of law and equity is contracts, as we before obſerved. And a pact or covenant, in the general ſenſe of it, comprehends all things about which men agree in their tranſactions, negotiations, and intercourſe with one another. Yet is it not here to be extended ſo largely, as to take in every agreement of opinion; but ſuch only as induce an obligation, or contain a conveyance of ſome right. Neither do we at preſent intend to treat of thoſe univerſal pacts, by which the propriety and dominion of things was at firſt eſtabliſhed; but thoſe particular contracts, which are limited to the benefit of certain perſons, and pre-ſuppoſe property and price. Theſe ſaith the prætor, (as the * mouth and oracle of the law, and building his opinion on the ſure foundation of natural juſtice and equity,) if they are not gained

* P. 4.

by

by ill practice, nor made against the laws, I will see kept; for what can be so agreeable to human faith, as the observance of those things, which they themselves have approved of, and made a law amongst one another. In contracts therefore, respect is first to be had to the things expressed in the agreement, if they may possibly be obtained, and for default of the things themselves, a sufficient equivalent is to be given.

Sect. 5. But the law of *England* was very defective in this point, and fell short of natural justice, where an actual conveyance was not obtained; which oftentimes, from the distance of the place, where a local ceremony was required, or from other circumstances wanting, was not immediately practicable. For executory agreements were there looked upon but as a personal security, and damages only to be recovered for the breach of them; most commonly either by an action of covenant, if there was a deed, or by an *Assumpsit*, if without deed. But it proving a great hardship, in particular cases, to be left only to the incertain reparation by damages, which the personal estate may perhaps not be able to satisfy; the court of equity therefore, where there was a sufficient consideration, did, in aid of the municipal law, compel a specifick performance. And there are many other cases, wherein equity will give relief, altho' there be a remedy at law, if that be insufficient; as for a nusance, by injunction, or the like, yet their decree binds the person only, and not the estate; because the Chancery is in this respect no court of record; tho' some think this opinion absurd, for both ought equally to be bound by the decisions of this court, or else there would be an impotence in the court, that would restrain it from doing justice. 4 *Inst.* 84. 1 *Roll. Rep.* 86, 190. 2 *Bulst.* 34. *Litt. Rep.* 166.

27 H. 8. 15. Sequestrations were introduced by Sir F. Bacon, in Q. Eliz. time, before which, Chancery found some difficulty in inforcing its decrees.

Sect.

Sect. 6. However the common lawyers continually poured out their complaints againſt this incroachment, as they imagined, on their own profeſſion; yet pretended all the while, that their only concern was, leſt this new juriſdiction ſhould ſhake the foundation of the ancient municipal laws of this realm. The law, ſay they, has appointed certain ceremonies, in the transferring of property, for the quiet and repoſe of ſociety. It has alſo provided certain technical words, of peculiar and determined ſignifications, for the limiting the duration of mens eſtates; and it is better to ſtick to the * known rules of law, than to follow the fancies of private men. But if the aſſurance is bad, and yet there is a remedy, to what purpoſe is the common law; But equity was not ſatisfied with this falſe and ſhallow reaſoning of the common lawyers. For it never pretended to any arbitrary ſway over the ſtated rules of law, but only a power of conducting and guiding them according to honeſty and good conſcience. And what poſſible inconvenience can there ariſe, where there is a good conſideration, and the intention is clear, that men ſhould be compelled to perform their engagements; and that all the means, without which that cannot be obtained at law, ſhould be ſupplied by a court of equity?

* P. 5.

Sect. 7. Equity therefore will ſupply any defects of circumſtances in conveyances; as of livery, ſeiſin in the paſſing of a freehold, or of the ſurrender of a copyhold, or the like. Alſo all miſpriſions in deeds, as in the names of the parties, or the ſum in a bond. And an award or charter-party, tho' void or defective at law, may find relief here. Nor ſhall any fiction of the common law, as the extinguiſhment of a covenant by marriage, prevent the interpoſition of this court. For equity regards not the outward form, but the inward

3 Ch. Rep. 99. 2 Ch. c. 55, 225. 2 Vern 2:c.

ward substance and essence of the matter; which is the agreement of the parties, upon a good and valuable consideration, and where the persons interested fully intend to contract a perfect obligation, tho' by mistake or accident, they omit the set form of law, so that no remedy is to be had to compel a performance of it in courts of civil judicature; yet are they bound in natural justice to stand to their agreement.

Sect. 8. And any covenant, tho' not specifick, but only a general personal covenant for indemnity, may be decreed here. For equity prevents mischief, and it is unreasonable a man should have a cloud continually hanging over him. Yet it seems, where the incumbrance is not necessary, but contingent, you should recover no damages at law till a breach, and therefore they ought not to decree it in equity. So altho' the Chancery cannot assess damages, yet a covenant by the husband, that the jointure should be and continue of such a value may be carried into execution in this court; for the master may enquire into it, or they may send it to be tried at law in a *Quantum damnificatus*. So a bill for a specifick performance of an agreement by the husband with a third person, for a separate maintenance to the wife, is proper here, notwithstanding that alimony belongs to the spiritual court. * And regularly, there are but four cases, wherein an agreement will not be binding in equity. 1*st*, For want of assent. 2*dly*, For want of testimony of the assent. 3*dly*, Where there is some vice or defect in the subject matter; or, 4*thly*, The want of a sufficient consideration.

Ab. E. c. 18. pl. 7.
1 Vern 189.
2 Ca. c. 146
2 Wheat. 290
* P. 6.

CAP.

CAP. II.

Of the Assent required in Agreements.

Sect. 1. WE are first then to examine, what consent is required to the making pacts and agreements valid. For the rule of the civil law is highly agreeable with natural justice; that in the translation of property there must be an union of minds and affections. For whether it be a sale, or a loan, or a free gift, or any other sort of contract, unless there be a mutual agreement, it can never have a full effect. Now consent is an act of reason, and accompanied with deliberation, the mind weighing as in a ballance, the good and evil on either side: So that creatures void of reason and understanding are incapable of giving a serious and firm assent. And thus ideots, madmen, and infants, were restrained by the *Roman* law from all manner of engagements and contracts, because they were supposed to be unable to judge of their own actions; and therefore the charge and care of them was committed to others. But the common lawyers endeavoured to set up a maxim of their own, in defiance of natural justice, and the universal practice of all the civilized nations in the world. For they said it was a known rule in their law, that no man of full age should be admitted in any plea to stultify and disable himself; because when he recovers his memory, he can't know what he did when he was of *non sane* memory; and therefore they concluded that he should have no relief for this, even in a court of equity; because it would be in subversion of a principle and ground in law. Yet some have thought that by the ancient

1 Inst. 2. b. 247. a. b.

4 Co. 123. b. 124. a. 125.

F. N. B. 202. C. D.

cient common law he might have the writ of *dum non fuit compos mentis;* and of conſequence might enter. And it is undoubtedly not for want of right to the thing, but of capacity to do the act, that a madman is hindered to avoid his own grant. For where the thing does not paſs by livery of his hand, the conveyance is abſolutely void; and therefore a ſurrender by deed of a tenant for life, being *non compos,* will not bar a contingent remainder. But now only privies in blood (*viz.* the general or ſpecial heir inheritable) may ſhew the * diſability of the anceſtor; and privies in repreſentation. as executors or adminiſtrators, the infirmities of the teſtator; and neither privies in eſtate, nor privies in tenure. For the difference is between a title of entry, as by reaſon of a condition, *&c.* and a right of entry, as in the caſes before mentioned; and the ſame diverſity holds in caſe of infancy and coverture.

Show. Parl. Ca. 150. 2 Salk. 576. 4 Co. 124, 125. * P. 7. Carth. 435. Salk. 427, 476.

Sect. 2. However the acts of a *non compos,* or ideot, unleſs of record, for the inconvenience of over-turning a record by a nude averment, were avoidable by law, even during his life-time, in a *ſcire facias* by the king, who is bound by his royal office to protect all his ſubjects, their goods and eſtates; and to prevent all incumbrances it ſhall have relation to the diſability. And this they ſaid was no impeachment of the rule; becauſe the ideot, or *non compos,* is no party to it, but the whole truth is found by the inqueſt. But no office could be found after his death; becauſe then the guardianſhip of the king was determined. And it ſeems to be upon the ſame ground, that bills in Chancery have been ſince brought, to ſet aſide conveyances and ſettlements by lunaticks and ideots, tho' in other reſpects reaſonable, and for the convenience of the family; for theſe bills ought properly to be brought by the attorney-general. Yet there is not a

4 Co. 123, 126. b. 1 Ch. c 153.

1 Ch. c. 153, 112. little difference between them. For a lunatick muſt be a party, as an infant, where a ſuit is commenced on his behalf; becauſe he may recover his underſtanding, and then he is to have his eſtate in his 4 Co. 127. b. own diſpoſal. And the committee of a *non compos* is but a baily, and accountable to him or his repreſentatives. But of an ideot, it is otherwiſe, for his recovery is not expected by the law; and therefore in the *Roman* law he was looked upon as civilly dead. And theſe bills are now eſtabliſhed in equity, Ab. l. ca. 279. where they hold, that the maxim of law before mentioned is to be underſtood of acts done by the lunatick in prejudice of others, that he ſhould not be admitted to excuſe himſelf on pretence of lunacy, but not as to acts done by him in prejudice of himſelf; for this can have no foundation in reaſon and natural juſtice.

9 Co. 31. a. 4 Co. 126. F. N. B. 232, 233. *Sect.* 3. As for the queſtion, who ſhall be deemed an ideot or *non compos*, there is no certain rule can be laid down: But it muſt be left to the wiſdom and diſcretion of thoſe, to whom the law has entruſted the trial of it. And altho' a man be found an ideot by inquiſition, he may after pray to be examined in Chancery. Yet this is not to be extended to every * perſon of a weak underſtanding, unleſs there be ſome fraud or ſurprize; for courts of equity would have enough to do, if they were to examine into the wiſdom and prudence of men in diſpoſing of their eſtates. Let a man be wiſe therefore, or unwiſe, if he be legally *compos mentis*, he is the diſpoſer of his own property, and his will 1 Inſt. 247. a. ſtands inſtead of a reaſon. And altho' drunkenneſs 4 Co. 125. a. Plowd. 19. is a kind of inſanity for the time, yet, as it is of 1 Hall. p. 6. 32. his own procuring, it ſhall not turn to his avail, either to derogate from his act, or leſſen his puniſhment; but it is a great offence in itſelf: And this holds, as well as to his life, his lands, goods, or 1 Ch. 6. 202. any other thing concerning him. However equity,

* P. 8.

as

as it ſeems, will relieve in this caſe, eſpecially if it were cauſed by the fraud or contrivance of the other party, and he be ſo exceſſively drunk, that he is utterly deprived of the uſe of reaſon or underſtanding; for it can by no means be eſteemed a ſerious and deliberate conſent, and without this no contract can be binding by the law of nature. And ſo, altho' there is no direct proof that a man is *non compos* or delirious, yet if he is of a weak underſtanding, and is harraſſed and uneaſy at the time, or if the deed be executed *in extremis*, or by a paralytick, it cannot be ſuppoſed he had a mind *adequate* to the buſineſs he was about, and might more eaſily be impoſed upon; eſpecially the proviſion in the deed being ſomething extraordinary, or the conveyance being made without any conſideration. And the rule of the common law itſelf, in caſe of wills, is very favourable: Altho' it can hardly perhaps be extended to deeds, without circumſtances of fraud or impoſition. For a memory; which the law there allows to be a ſound memory, is, when the teſtator hath underſtanding to diſpoſe of his eſtate with judgment and diſcretion; which is to be collected from his words, actions and behavior at the time, and not from his giving a plain anſwer to a common queſtion. And therefore a will obtained *in extremis*, and upon importunity of the teſtator's wife, his hand being guided in the writing of his name, may be ſet aſide. 6 Co. 23.

Sect. 4. And the grants of infants, and lunaticks, are parallel both in law and reaſon. For infants are diſabled, by a maxim in law, to contract for any thing, but neceſſaries for their perſons, ſuitable to their degree and quality. And what is neceſſary or not, ſhall be tried by the judges, and not by a jury. Which maxim was grounded upon a preſumption, that infants moſt commonly, Co. Litt. 172, 581. Cr. Ja. 560. 2 Ro. Rep. 194. Poph. 151. Cr. El. 582. Palm. 361. Cart. 215. 1 Salk. 386. 1 Ro. Ab. 729. Gould. 103.

* P. 9. before they are of the age of * twenty-one years, are not able to govern themſelves. And therefore the law takes upon itſelf the protection of their rights; and ordains, that they ſhall be favoured in all things which are for their benefit, and not prejudiced by any thing to their diſadvantage. So that neither as bailiff, nor for goods to carry on a trade, can an infant be charged; becauſe there was no neceſſity that he ſhould trade, neither does it appear for his advantage. And ſuch contracts, as may not be intended for his benefit, are abſolutely void.

Ab. Eq. Ca. 6, 283. Co. Lit. 172 Salk. 386, 387.

Co. Lit, 172 5 Co. Prim. Ca. Wentw. Ex. 214, 215 Godolph. Orp. Leg. 103. Off. Ex. 208 Co. Lit. 380. 2 Ro. Ab. 15 2 Inſt. 483. 12 Co. 122. 2 Bulſt. 320. Yelv. 155. 3 Mod. 229.

Sect. 5. But an infant may be an executor, and of conſequence may be charged for what he does as executor according to law; becauſe the law enables him; and if he does any thing, to which he is compellable by law, it is good, and will bind him. And altho' a fine or recovery is never taken from an infant; for it is againſt the duty and office of the judge or commiſſioners, if they know of it; yet if it be taken, and not reverſed during his minority, it is unavoidable. And there is no way to vacate it at law, becauſe his age is triable only by inſpection; and no man would be ſure of his inheritance, if records might be avoided by averments. However ſometimes recoveries have been admitted upon privy ſeals, upon the petition of fathers upon the marriage of their ſons; but now it is but rarely ſuffered, becauſe of the miſchiefs it occaſioned. But certain it is, that they may be charged for treſpaſſes which are *vi & armis*; and ſo it ſeems in trover, becauſe a tort. And altho' they are not capable of doing an injury knowingly, it is ſufficient that they are the phyſical cauſe of a damage they had no right to do. The law of *England* therefore makes a difference between crimes and treſpaſſes: And in the one conſiders the intent, but in the other only the damage done. For the obligation to reſtitution ariſes from the thing itſelf

Hob. 199. Co. Car. 1 Rol. Abr. 731. 2 Salk. 567. 1 Vern 461. 1 Sid. 258. 1 Lev. 169.

tſelf, and natural equity; but puniſhments are for the example, and to deter others. Neither did the court ever pretend to change the nature of infants eſtates; or to make that abſolute, which was defeaſible: So that where an eſtate is given to an infant, upon a condition, ſuch acts, as an infant can perform, muſt be done by him, and infancy in ſuch caſe is no excuſe. 1 Inſt. 233. 8 Co. 44. 1 Vent. 200. 2 Lev. 21. 2 Vern. 343, 560. 1 Mod. 300. 2 Vern. 343. 1 Inſt. 233. b

Sect. 6. As for feme coverts, the law is much the ſame, with reſpect to their power of contracting, as of infants; for they have no will but the will of their huſbands; tho' in the *Roman* law it was otherwiſe. And in this, equity follows the law. For the huſband's goods are looked upon, with * reſpect to the wife, as if they were in abeyance or cuſtody of the law, to be charged only by act of law. And if ſhe elope, ſhe loſes the privilege of charging him even for neceſſaries; as at common law ſhe loſt her dower. But it is certain that a wife may have a ſeparate eſtate from her huſband, as by agreement before or after marriage; or by decree for ill uſage, or alimony; or otherwiſe ſecured in truſtees hands for her. And as to theſe ſhe is in nature of a feme ſole, and may ſue, or be ſued, without her huſband; and they are not in the power of her huſband, but in her own diſpoſal, and the produce of them, by writing in nature of a will, and are liable to her debts. And if ſhe has a ſeparate maintenance, and lives ſeparate, and this known to tradeſmen, they cannot truſt her, and recover of the huſband at law. Yet while the marriage continues, the living ſeparate does not deſtroy the legal rights of the huſband. 1 Sid. 109. 1 Mod. 128 1 Lev. 4. 1 Keb. 69, 80 1 Lev. 4, 5. 1 Bac. Abr. Law, f. 296. * P. 10. 1 Vern. 245. 2 Vern. 493, 671, 752. 1 Inſt. 33. a. 2 Vern. 671, 672, 752. A. E. c. 67. 1 Ch. Rep. 4, 164. 2 Vern. 659. 1 Ch. c. 85 1 Ch. c 118 N. Ch. Rep. 56. 1 Vern. 245. Salk. 116. 1 Vern. 126. 1 Sid. 109. 1 Bac. Abr. Law. 296.

Sect. 7. Another impediment of aſſent is ignorance and error, either in fact or in law; if it be the cauſe and motive of the agreement. And if the miſtake is diſcovered before any ſtep is taken towards performance, it is but juſt that he ſhould have

have liberty to retract; at leaſt upon ſatisfying the other of the damage that he has ſuſtained by loſing the bargain. But if the contract is either wholly or in part performed, and no compenſation can be given him, then is it abſolutely binding, notwithſtanding the error. Yet this is not to be underſtood where there proves to be an error in the thing or ſubject, for which he bargained. For then the buſineſs is null in itſelf, by the general laws of contracting, inaſmuch as in all bargains, the matter, about which they are concerned, and all the qualities of it, good or bad, ought to be clearly underſtood; and without ſuch a diſtinct knowledge, the parties cannot be ſuppoſed to yield a full conſent.

Sect. 8. Much more ought a miſtake to render a pact or agreement invalid, when accompanied with fraud and circumvention; if it were occaſioned by one of the parties, who by that means drew the other into the engagement; for then he is undoubtedly bound to make reſtitution for the injury. Yet the rigor of the common law would admit no averment by a man againſt his own deed: Except in the king's caſe, who had favour ſhewn him, becauſe the public intereſt was bound up with his.

1 Vern. 20. But it is a conſtant rule in equity, that where there is, either *ſuppreſſio veri*, or *ſuggeſtio falſi*, the releaſe

* P. 11. or other * deed ſhall be avoided. As if a man

1 Vern. 227. ſhould be informed by *J. S.* that *J. N.* wanted to be a purchaſer, and the ſeller ſhould declare, that *J. N.* ſhould have a better penny-worth, than another perſon; and upon this he ſhould article with *J. S.* for the ſale of it, when this purchaſe was in reality for a ſtranger; equity would not carry ſuch a contract into execution, tho' without doubt he might have ſold it to *J. S.* the next day. And even a miſapprehenſion of the party has been held ſufficient for this purpoſe. But it is not every

ſurprize,

surprize, that will avoid a deed duly made, nor is it fitting; for it would occasion great incertainty, and it would be impossible to fix what was meant by surprize. For a man may be said to be surprized in every action, which is not done with so much discretion as it ought to be. But the surprize here intended must be such, as is accompained with fraud and circumvention; and then it must be proved; for fraud is a thing odious in law, and never presumed. And if the fraud proceed altogether from a stranger, we are left to our remedy against him; and it is to be looked upon, as to the parties, as a mistake or error only, and to be governed by the rules before laid down. 3 Ch. c. Bath & Montague. 1 Vern. 32.

Sect. 9. But further, in all contracts purely chargeable, if there appears to be an inequality, altho' there was no deceit on either side, and all the faults of the things were exposed: Yet if the damage be considerable, the bargain ought to be made void. And this estimate of the damage is to be taken either from the exorbitance of the price, or the poverty of the party injured; for no man should be a gainer by another's loss. But a small damage, even in the law of nature, is not sufficient to break off a bargain, for the benefit of traffick, and the ease of the magistrate.

The civil law fixed this at half the value of the highest price the thing was really worth, to be sold at the time of the contract. And some have wished the law were so in *England*. But altho' the court of Chancery have no fixed rule, how many years purchase is a reasonable price of lands; because the iniquity of the bargain does not depend upon the price; for what may be a reasonable price in one case, may be unreasonable in another: Yet it is a certain rule, that where the bargain is plainly iniquitous, and it is against conscience to insist upon it, as forty years purchase for lands; or an extravagant 2 Ch. c. 131. Rep. in Eq. 155.

extravagant price for ſtock, as was given in the *South-Sea* year, equity can't ſupport it; for that would be to decree iniquity. So a releaſe of an equity of redemption has been ſet aſide; the court being ſatisfied upon the proofs, that the value of the land was much greater, than to make a ſatisfaction for debts for which it was given.

* P. 12.

2 Vern. 423 *Sect.* 10. But this rule ſeems to extend chiefly to ſuch things, as have ſome ſtated and ſettled price. For in other caſes, there is no reaſon, but as a beneficial bargain will be decreed in equity; ſo if it happens to be a loſing bargain, it ought equally to be decreed. As if a man takes a leaſe of water-works, in order to let it out in ſhares, and make a profit of it, the aſſignee in truſt for thoſe who bought ſhares, ſhall be compelled in equity to pay the reſerved rent, tho' it be above double the value of what it proves to be worth; for the contract is to be judged of as matters ſtood when it took effect. And ſo hazardous bargains, to be paid double, or to have an eſtate of double or treble the value of what is at preſent advanced, after the death of tenant for life, but if ſuch tenant for life out-lives the perſon, to whom the money is lent, then the whole to be loſt, are not to be ſet aſide without circumſtances; for their may be nothing ill in thoſe bargains, the price at the time being the full value; and what after happens (as the death of the party, upon whoſe death the eſtate was to fall, or the money to be paid) cannot make any difference.

Sect. 11. But an unconſcionable bargain, as a purchaſe or ſecurity got from an heir in his father's life-time, are now uſually avoided in equity. For he would juſtly forfeit the character of an honeſt man, who ſhould endeavour to make an advantage of this eaſy age; and enrich himſelf at the coſt of thoſe, who either could not foreſee, or do not rightly

1 Vern. 167, 271.
2 Ch. c. 136.
2 Vern. 15.

rightly apprehend the loſs. And ſo in the *Roman* Law, the lending money to heirs, in their father's life, was prohibited expreſly. And altho' the money would have been loſt, if the heir had died before the father: Yet it being an unrighteous bargain in the beginning, for it is not likely he would have made it but in expectation of an unreaſonable advantage, it cannot be helped by matter *ex poſt facto*. And no difference, whether it was for money lent, or wares taken up to ſell again, as improvident heirs are uſed to do. But the difference ſeems to be, if the heir has no maintenance from the father, but was turned not upon unreaſonable diſpleaſure; there perhaps the bargain, if not exceſſively beyond the proportion of ſuch aſſurances, ſhall ſtand; becauſe it is not to ſupply the luxury and prodigality of the heir, but to keep him from *ſtarving. Yet it muſt be confeſſed, in former times chancery did not interpoſe in theſe caſes. But the reaſon was, becauſe there was another court that then did; and this was the ſtar-chamber, which could not only relieve the plaintiff, but puniſh the defendant. And altho' that court was aboliſhed, for the abuſe that was made of its power: Yet there are many caſes in which we find the want of ſuch a juriſdiction. For a man may now practiſe a notorious cheat, and pay the fine ſet upon him by law, which perhaps will be 20*l.* or ſome ſuch ſum, and count all the reſt as clear gains by his villany

* P. 13.

Sect. 12. Let us now examine more minutely the force of theſe fraudulent and unequal contracts: for it is certain, on the part of him who committed the fraud, they are irrevocable; and if he ſhould require a nullity of the contract, ſuch a demand, which is ſcandalous, ought not to be granted him. Nay, if ſuch a fraudulent perſon comes as plaintiff into a court of equity, to have what was really and

1 Ab Eq. c. 9.

bonâ Fide lent, he ſhall not have it; becauſe he has committed iniquity. But as to all others, a conveyance obtained by fraud, is the ſame in equity as if no conveyance had ever been made. And therefore a contingent eſtate, abſolutely deſtroyed by it, ſhall yet be ſet up in chancery, as if it were ſtill ſubſiſting, and nothing had been done. And there are other covenants which may be avoided only by one ſide; as between a minor and one of full age. Nor is this inequality of the condition of the contractors unjuſt; for every one ought to know the ſtate of him with whom he treats. Yet thoſe who are not by nature incapable of contracting, but prohibited only by ſome poſitive law, altho' they cannot legally be forced to ſtand to their engagements, yet if they do perform them, they cannot afterwards be relieved; for there is a natural obligation, at leaſt ſo far as they are not naturally unjuſt. As in the *Roman* law, if a ſon, under the power of his father, pays what he has borrowed, to which, tho' of age, he was not obliged. And in catching bargains of young heirs, in our law, always where they are ſet aſide for fraud, the plaintiff muſt do equity to the defendant, by paying him what was really lent.

1 Vern. 445

1 Ch. c. 276
2 Vern. 467.

Sect. 13. Alſo an obligation, that was at firſt invalid, may afterwards recover ſtrength, by the intervention of ſome new cauſe fit to create a right: And for this a full agreement is ſufficient, tho' not expreſſed by any verbal ſigns; ſince others may do as well. So at the common law, there was an implied as well as expreſs confirmation as by * acceptance of rent, or the like, which was founded on this reaſon; that the law will never intend a wrong, if the act, by any conſtruction, may be made lawful: And he cannot receive the rent, or the like, under the contract, without a confirmation of it. But the acceptance of a collateral thing, or by a ſtranger

3 Co. 65. a.
* P. 14.

ſtranger to the contract, cannot be ſupported by any intendment. Nor can an implied confirmation work ſtronger than if it were expreſs; as to make good a void eſtate, or one not commenced, or *in Eſſe*. But in natural juſtice and equity, this is carried further than at law. And therefore in chancery, an agreement, tho' not binding againſt an infant, yet ſhall be decreed; the infant having received intereſt under it after he came of full age. And ſo if he does not expreſly ſignify his deſire to be relieved, when he has convenient means, it is to be preſumed that he is willing to abide by it. As where a leaſe was made by an infant, and ſtood unqueſtioned, and the rent was received by a perſon under no diſability for five years; this ſilence amounts to a confirmation. And according to the civil law, the queſtion muſt not only be moved in five years, but decided in ten.

1 Vern. 131.

2 Vern. 224.

CAP. III.

Of the Want of Teſtimony of the Aſſent.

Sect. 1. WE are now come to our ſecond diviſion, which was the want of teſtimony of the aſſent. The uſual ſigns therefore of conſent being words, we muſt enquire what words will make a covenant to be performed in *Specie*. And here we may obſerve, that altho' a covenant is properly of a thing future or paſt; for if it be of a matter *in præſenti* it veſts an immediate property, and amounts to a gift or grant, the nature of which is to be executed immediately: Yet even at law, whenever the intention of the parties can be collected out of a deed, for the doing or not doing a

thing, covenant will lie. For a covenant is but
Ch. c. 294. an obligatory agreement of the parties by deed;
1 Leon. 324 and any words, which ſhew the intents, are ſuffi-
1 Roll. Ab. cient for this purpoſe. And therefore a covenant
519. Style. will lie on a bond, or the *Reddendum* in a leaſe;
Carth. 387. for it proves an agreement. So whatſoever words
235. amount to a grant will make a leaſe; for where
1 Inſt. 45. b. there is ſubſtance, the law will apply the words to
the intent, tho' they ſound differently. And the
reaſon of this was, that chattels were of little value
* P. 15. at the common law, when perſonal * property was
but ſmall, and leaſes for above forty years were not
permitted. But for the paſſing the freehold and inheritance there were always required apt words, or words tantamount. Yet; altho' at the common law it is ſaid that the law ſhould rule the intent, and not the intent the law, where there is a good conſideration, and no doubt of the intent, equity will relieve againſt the rigour of the law, and make the conveyance valid. And this is agreeable with the rule of the civil law. For there no ſet form of words, or of writing, was required in contracts: But they were perfected by the bare aſſent of the parties. *A Fortiori,* where the contract is good at
2 Vern. 16. law, equity will carry it into execution. And ſo
1 Ch. c. 294. where there was no expreſs covenant, concerning the value of the lands to be ſettled, but only the marriage articles recited them to be 500*l. per Ann.* Yet equity will decree the deficiency to be made up out of other lands.

Sect. 2. And altho' they formerly thought, that where there was a bond given to perform any agreement, the obligor had his election, either to do the thing, or pay the money; and that the obligee, having choſen his ſecurity, ought to be left to it; yet now they conſider the penalty only as a collateral guard to the agreement, which ſtill remains the ſame, and unimpeached by the parties providing

a further

a further remedy at law for the performance, and therefore proper to be executed in this court. So if the obligor dies before the day, yet the lands muſt be ſettled according to the agreement, and ſo it has been often done. For it would be hard, that the enlarging his ſecurity at law, ſhould make him in a worſe condition in equity than if he had taken none at all; nor can it ever be intended, that a bond, added only to enforce the performance, ſhould weaken the lien of the agreement. Abr. E, c. 18. pl. 8.

Sect. 3. But regularly the law never gives any other remedy than what the party has provided for himſelf; for this would be to alter the agreement of the parties; tho' in ſome caſes it is otherwiſe. And the diverſities ſeem to be thus ſettled. *1ſt*, Where there is no remedy at law at all, equity will certainly grant one. As in caſe of a rent-ſeck, to decree ſeiſin; or where the deeds, by which it was created are loſt, and ſo uncertain what kind of rent it was; for wherever there is a right, there ought in equity to be a remedy for it. But if a man comes to be, remedileſs at common law, by his own negligence he ſhall not be relieved in equity. As if a man loſes his deed, unleſs he can make it appear that it was once actually in his cuſtody, and that * he has been deprived of it by ſome caſualty or misfortune. So if a man deſtroys his remedy to diſtrain, and cannot have debt for the arrears, it being due out of a freehold, he ſhall not be relieved for them in equity. So in caſes proper for law, a man muſt defend himſelf by legal pleadings. And a court of equity is not to relieve either miſpleading, or where there is a neglect and want of a plea, or no proper plea put in in time; for it was his own fault. So equity will not relieve for meſne profits, unleſs in caſe of a truſt, or an infant, where no entry was made by the perſon entitled to the meſne profits. *2dly*, Where there is a remedy at law, equity will 1 Ch. c. 79, 147. * P. 16. 1 Vern. 119. 2 Vern. 368.

will not grant a further one, altho' the remedy at law is not ſufficient: Unleſs there be ſome fraud, or the like. And therefore in all caſes, where the court has decreed payment of the rent, and thereby charged the perſon, no other remedy could be obtained. And the uſual relief, even where for want of ſeiſin there was at law no remedy, is only to decree ſeiſin. But this is to be underſtood of a remedy provided by the party himſelf; as in a grant, or reſervation of a rent by deed; otherwiſe of a deviſe of a rent, in which the deviſor is intended to have been *inops conſilii*, for this is a particular miſchief, not againſt any maxim or rule tho' unprovided for by the law.

Moor 805. Latch 147.

Sect. 4. There is alſo an implied as well as an expreſs aſſent. As where a man who has a title, and knows of it, ſtands by, and either encourages, or does not forbid the purchaſe, he ſhall be bound, and all claiming under him by it; neither ſhall infancy or coverture be any excuſe in ſuch caſe; and this ſeems a juſt puniſhment for his concealing his right, by which an innocent man is drawn in to lay out his money. And for the ſame reaſon, ſuch fraud in a mortgagee will without doubt poſtpone his mortgage. So if *A.* makes an abſolute conveyance to *B.* for 500*l.* and *B.* executes a defeazance upon payment of 1500*l.* within ſixteen years, and *B.* on his marriage ſettles this as an abſolute eſtate on his wife and the iſſue of that marriage, there being proof that *A.* made the conveyance to enable *B.* to get a fortune, tho' another lady, and not the wife he really married; yet he ſhall be bound as *particeps criminis*, notwithſtanding that the wife's father had notice of the defeaſance before the ſettlement made. So if *A.* agree for the purchaſe of timber, and he and *B.* enter into a bond that *A.* his executors and adminiſtrators ſhall not cut down timber under ſuch a ſize; it comes out that *A's*

2 Vern. 150, 151, 370, 550.

name

* name was only made uſe of for *B.* *B.* cuts down timber under the ſize; there can be no remedy againſt *B.* upon this bond, but it is a fraud upon the ſeller, and relievable in equity. But this relief is only extended to jointures, mortgages, and ſuch as come in upon a conſideration, and not to a voluntary deviſee. * P. 17.

Sect. 5. However, where the intent is only to give damages, equity will not decree a ſpecifick performance. As where a ſettlement is made to the huſband for life, remainder to his intended wife for life, remainder to the heirs of the body of the huſband on the body of the wife, remainder to his own right heirs, with a covenant, that he would not dock the intail, nor ſuffer a recovery: Altho' this covenant ſeems to be executory, and like a covenant that a man would not execute a power to make leaſes; yet there is a difference where the agreement is ſubſequent to the raiſing the power to extinguiſh it, and the caſe here, where all is in the ſame deed. For the party here knew that he had a power to bar the intail, and therefore agrees to accept of a covenant, by which he is to have damages only, and not the thing *in Specie*; for that would be to carry it beyond the agreement. 2 Vern 635. 1 P. Will. 104.

Sect. 6. The agreement ought alſo to be compleat and perfect; for *pacta contractuum præparatoria* are not binding, either in law or equity. As if upon a treaty of marriage, the father and huſband go to counſel, who hearing the propoſals on both ſides, takes down minutes or heads of them in writing, and gives them to his clerk to draw a ſettlement; theſe preparatory heads might have received ſeveral alterations or additions, or the agreement have been entirely broken off upon further inquiry into the parties circumſtances; and therefore if they marry without the conſent of the father, it is at their peril; for their is no caſe where 1 Ab. E. Ca. 21. Pre. ch. 402.

an

an agreement, tho' wrote by the party himſelf, ſhould bind, if not ſigned, or in part executed by him. But if the marriage had been had upon the foot of this writing, and the father had been privy and conſenting to it, he ſhould then have been obliged to execute his part. So in a will, if the writing be but a draught or preparation to a teſtament, and not a teſtament itſelf, it is without any force, for the teſtator muſt have *animum teſtandi.* But notes taken from the mouth of the deceaſed, of his laſt will, or made by his appointment, and read to him, tho' not writ in form of law, were a ſufficient will in writing upon the ſtat. of 32 & 34 *H.* 8. And in wills, where the deviſes * are ſeveral and diſtinct, the perfect is not to be hurt by the imperfect, altho' the teſtator die before the whole is finiſhed; for perſeverance, and not mutation of will, is to be preſumed.

1 And. 34.
3 Brownl. 44.
Dyer 72.
3 Co. 31. b.
* P. 18.

Sect. 7. And wherever there is a demand in law or equity, there muſt be a certainty of the thing demanded, to be adjudged or decreed, or at leaſt a mean to reduce it to a certainty; for otherwiſe the court will not know how to give judgment. The agreement muſt alſo be fixed and ſettled, and not wavering and revocable, or elſe the repreſentative will not be bound by it, if not perfected before the parties death. But here are ſeveral diverſities to be obſerved. 1*ſt*, Between a covenant, or other agreement, which is perfect and compleat, altho' it take effect in poſſeſſion upon a future matter precedent, and a covenant and agreement incompleat and imperfect, which is to be reduced to its perfection, by future matter *ex poſt facto*, for in the one caſe the intereſt and eſtate in the land is preſently veſted, but in the other not; and therefore it muſt be made perfect in the life-time of the parties, or elſe will not bind; for the lien never veſting in the anceſtor or teſtator, cannot deſcend upon

upon the heir or devolve to the executor. As if land is rendered by fine to one and his heirs, there the land is bound, ſo that he cannot alter or defeat it: And tho' he, to whom the render is made, dies before the execution, yet his heir ſhall have it. But if a man deviſes land to one and his heirs, and after the deviſee dies before the deviſor, the deviſe is void; for the will was alterable at the pleaſure of the deviſor, and the heir cannot be a purchaſor; (becauſe by the words, he is appointed to take by way of limitation. 2*dly*, Between a covenant or agreement executory, and a grant or bargain which muſt take effect, and change the property of the thing granted, either preſently and at once, or depending upon ſomewhat that ſhall reduce it to its full effect; and therefore if *A.* grant all his woods and under-woods growing upon all his manor, which could conveniently be ſpared without prejudice to the eſtate of his manor, this grant is void; becauſe it is uncertain which trees may be ſpared, and which not, and there is no perſon appointed to determine it. But if it were a covenant or agreement executory, he might have taken trees by force of it, and have juſtified ſpecially, averring, that they might be ſpared, and put himſelf upon the jury for it.

Plowd. 345.

Moor 880. Hob. 178. Dav. 36.

Sect. 8. But beſides the bare words of the agreement, the common law, to prevent impoſition, ordained certain * ceremonies where an intereſt was to paſs; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity, where there was a conſideration, the want of ceremonies was not regarded. However, in former times, this court was very cautious of relieving bare parol agreements for lands, not ſigned by the parties, nor any money paid; altho' they would ſometimes give the party ſatisfaction for the loſs he had ſuſtained. And now by the ſtatute of

* P. 19.

29 *Car.* 2. *cap.* 3. If an agreement be by parol, and not ſigned by the parties, or ſome body lawfully authorized by them, if ſuch agreement be not confeſſed in the anſwer, it cannot be carried into execution. But where in his anſwer, he allows the bargain to be compleat, and does not inſiſt on any fraud, there can be no danger of perjury; becauſe he himſelf has taken away the neceſſity of proving it. So, if it be carried into execution by one of the parties, as by delivering poſſeſſion, and ſuch execution be accepted by the other, he that accepts it muſt perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed. And it is unconſcionable, that the party, that has received the advantage, ſhould be admitted to ſay, that ſuch contract was never made. So if the ſigning by the other party, or reducing the agreement into writing be prevented by fraud; it may be good. And altho' parol agreements are bound by the ſtatute, and agreements are not to be part parol, and part in writing: Yet a depoſit, or collateral ſecurity, for the performance of the written agreement, is not within the purview of the ſtatute.

Ab. Eq. ca. 19. Prec. ch. 208, 374. 1 Vern. 363. 1 Abr. Eq. ca. 19. 1 Vern. 297. Prec. ch. 404.

Sect. 9. So where, in conſideration of the agreement, the plaintiff had expended great ſums of money about the premiſſes, and charged that part of the agreement was, that the agreement ſhould be put into writing; there is a difference to be taken where the money was laid out in laſting improvements, and where for fancy or humour. And its clear a bill would hold ſo far as to be reſtored to the conſideration money, expended in valuable improvements; for a leaſe, tho' void for want of legal ceremonies, yet is a ſufficient colour to poſſeſs. But the difficulty ſeems to be, that the act makes void the eſtate, but does not ſay that the agreement itſelf ſhall be void. So that poſſibly a man may recover

1 Vern. 159.

recover damages for the non-performance of it, and then there is no doubt to decree it in equity. So where the plaintiff, purſuant to a parol * agreement for a building leaſe, proceeded to pull down part, and build part, and before any leaſe executed, the owner of the ſoil died; equity will decree a building leaſe to be made according to the agreement. But the execution in part, to make a parol agreement for land valid in equity, muſt be valuable and meritorious. Nor is giving 5*s.* or 10*s.* earneſt, *&c.* ſufficient: But in theſe caſes an action at law muſt be brought, and damages only recovered. For when this court does aſſiſt the common law, and enforce the performance of the agreement in *Specie*, it does it upon important reaſons, *viz.* when otherwiſe there would be a great burthen and penalty upon the party, if having performed part, by which he himſelf has a loſs, and the other a benefit, he ſhould not have a reciprocal performance.

2 Vern. 456.

* P. 20.

Sect. 10. There is another branch of the ſtatute which reſtrains marriage agreements, not made in writing and ſigned by the party. But an agreement by letter takes it out of the ſtatute; for this is a writing ſigned by him, and a man may make a bond in a letter, if he puts his hand and ſeal to it. As to that clauſe which relates to the writing, ſigning and atteſting of wills, it is ſaid, that the ſigning of the deviſor or witneſſes is not neceſſary. And this ſtatute, and that of inteſtates, were drawn up by J. C. *Hale*, and the judge of the Prerogative courts. And there are many things in them that are according to the plan of the civil law: And the conſtructions have been accordingly. And there is the ſame rule of property in equity, as in the law; and the ſame expoſition of the ſtatute law; and the rather, becauſe it is a ſtatute of frauds, which is the proper buſineſs and juriſdiction of a court of equity to ſuppreſs.

2 Vern. 34, 322. 3 Lev. 1.

In 3 Lev. 1. held that the ſealing is a ſigning within the act.

Preced in Chan. 599

Sect. 11. And it has been ſaid, that where there is a written agreement, the whole ſenſe of the parties is preſumed to have been comprized therein, and it would be dangerous to make any addition, in caſes where there does not appear any fraud in leaving out any thing. Yet if by proof it appears that a ſettlement was intended, and the articles agree with the intent of the parties, but the ſettlement does not, it ſhall go according to the articles, altho' the ſettlement was made before the marriage, when it may be ſuppoſed to have been waved, as it might be before marriage, tho' not afterwards. So where the huſband, when he propoſed the treaty of marriage, offered to ſettle 500*l. per Ann.* jointure, and after the marriage took notice, that the jointure ſettled was not ſo much, and talked of making it up ſo much; altho' there was no covenant or agreement proved, whereby he bound himſelf to make a jointure of that value; yet the heir ſhall be decreed to make it up. For a covenant is but an evidence of the agreement; and therefore, if there be any other evidence, which proves the agreement, it is as good.

2 Vern. 58. 1 Williams 123.

1 Vern. 16.

* P. 21.

Sect. 12. And ſo much for the agreement of the party that conveys. But an aſſent, on the part of the perſon that takes, is alſo eſſential to all conveyances and contracts; for where a man is to be veſted with an intereſt, his acceptance is neceſſary; otherwiſe of a bare authority only. Yet this is not to be compared with ſuch collateral acts or circumſtances, as by the poſitive law are made the effectual part of a conveyance. *viz.* Livery of ſeiſin, attornment, and ſometimes entry of the party; as in caſe of exchanges, or the like. For where an act is done for a man's benefit, his agreement is implied till he diſagrees; becauſe no man can be ſuppoſed to be unwilling to do that which is for his advantage. And this does not hold only in conveyances,

conveyances, but in the gift of goods or chattels, whether in poſſeſſion or action. But the donees may make refuſal *in Pais;* and hereby the property and intereſt ſhall be deveſted out of him; for a man cannot have an eſtate put into him in ſpite of his teeth. But when a freehold is veſted in him, it cannot be deveſted by nude parol *in Pais;* but remains in him always till diſagreement in a court of record, to the intent that the tenant of the *præcipe* may be the better known: Except in ſome ſpecial caſes.

CAP. IV.

Of the Subject Matter of Covenants.

Sect. 1. IT follows in order, that we treat of the ſubject matter of covenants. And here it is a certain rule, that agreements receive all their force from the ability of the parties, and can never extend further; for of ſo much, and no more, have they a liberty of diſpoſing. If therefore they know on both ſides that the thing is abſolutely impoſſible, and are privy to each other's knowledge as to this point, the engagement cannot be eſteemed a deliberate and ſerious act, or be of any validity. But if the undertaker only knew the impoſſibility, and not the other party, he ſhall pay him the damage that he ſuſtains by being thus impoſed upon. And ſo if he neglected to weigh his own ſtrength, ſo as to undertake an impoſſibility, which, upon due conſideration, he might have * found to be ſuch. And in the civil law, an impoſſible condition avoided the contract; for they concluded, that by the adding a condition, which they knew to be impoſſible, the parties could not intend the agreement ſhould be of any force. Yet it ſeems, in the law of *England*, the rule is not the ſame of conditional

* P. 22.

as

as of other contracts. For by that law, an agreement to do a thing in itſelf impoſſible, or out of the power of man, is void in all caſes. And they make this difference between an impoſſible and an incertain limitation of an eſtate; that the firſt cannot be intended any part of the contract, nor to have been the ſubject of deliberation; for no man in his ſenſes, deliberates about what is abſolutely out of his power: But an incertain limitation is void upon another account, *viz.* becauſe the court cannot
1 Inſt. 206. a, b. aſcertain it. But as to impoſſible conditions, if they be precedent, the intereſt will never veſt: But if ſubſequent, the deed is ſingle; for it ſhall be intended that he knew he could not perform it, and ſo did not deſign to defeat the deed.

Sect. 2. But a man may bind himſelf to do any thing, which is not in itſelf impoſſible; and it is at his peril if he does not perform it. And the legal diſtinction between a near and remote poſſibility, having no foundation in reaſon, is not regarded in equity; and therefore ſince the ſtatute of 21 *H.* 8. *cap.* 15. when long leaſes could firſt be taken with ſecurity, a remainder of a term for years was admitted there, and deemed as ſtrong an intereſt as an eſtate
2 Vern. 353. of freehold and inheritance. So if *A.* covenants, *&c.* in caſe he dies without iſſue, to give his lands in *D.* to his brother, this ſhall be carried into execution, upon the falling of the contingency, altho'
1 Ch. Rep. 29. the limitation be after a dying without iſſue. So altho' a grant of a future poſſibility is not good in law; yet a poſſibility of a truſt in equity might be aſſigned. So a covenant to ſettle lands, of which he had only a poſſibility of deſcent, ſhall be carried into execution in equity; for the court does not bind the intereſt, but inſtead of damages at law, enforce the performance in *Specie*. But the law does not admit of grants, or other conveyances, except there be a foundation of an intereſt in the

the grantor, and he has the thing either actually or potentially. Yet of declarations precedent it does allow, provided it be afterwards enforced by some new act. As if a man covenants to purchase the manor of *D.* and levies a fine of it before such a day, to certain uses expressed in the indenture of covenants, this deed to lead the uses will be * sufficient tho' the land is purchased after; because there is a new act to be done, *viz.* the Fine. But if I covenant with my son, in consideration of natural love, to stand seised to his use of the lands which I shall after purchase; yet the use is void: The reason is; because there is no new act to perfect this beginning, and I had nothing at the time of the covenant. So if I mortgage land, and after covenant with *J. S.* in consideration of money, that after entry for the condition broken, I will stand seised to the use of the said *J. S.* and I enter, and this deed is enrolled, and all within the six months, yet nothing passes; because this Enrollment is no new Act, but only a perfective ceremony of the first deed of bargain and sale. And the law is the stronger in this case; because of the vehement relation, which the enrollment has to the time of the bargain and sale, at which time I had nothing but a bare condition. So the statutes of Wills of land require, that the devisor should be seised of the land at the time of making his Will. But a man may devise things personal which he has not; for the legacy passes not by the will, but by the assent of the executor, to whom the will is only directory. And whatever thing would come to my executors. I may dispose of by my will, as a right of a term, or a thing in action when recovered; for the executor has his authority only to fulfil the will. But at common law, what should not be done by my executors, but by my heir, could not be devised, as a possibility, *&c.* unless vested with an

* P. 23.

Plowd. 343 Salk. 237.

2 Vern 688.

Prec. Ch. 489.

31 Ass. 3.

an intereſt. Yet it ſeems, ſince the ſtatute of uſes, the deviſee may take benefit of it, by an equitable conſtruction.

3 Lev. 427. 2 Vern. 463. Duke's Ch. Uſes, 110.

Sect. 3. And even at law, a man is bound to do all that lies in his power; ſo that if part of the agreement becomes impoſſible by the act of God, that does not diſcharge the reſt, altho' it were in the disjunctive, and he is deprived of his election. So if the whole were at firſt impoſſible, yet if it may become poſſible, before he is compellable, to do it, it is not void; for the law reſpecteth the right of poſſibility, and will have nothing to be void, that by poſſibility may be made good. As where a dean and chapter, before the diſabling act, made a leaſe for ninety-nine years, and covenanted to renew, at the expiration of the ninety-nine years, for ninety-nine years more; altho' the covenant is entire, yet they ought to make ſuch leaſe as is in their power, *viz.* for forty years, which was allowed them by the ſtatute.

* P. 24.

**Sect.* 4. And it is indiſpenſably neceſſary that we have both a natural and moral power of performing what we undertake. For it would be abſurd, that an obligation, which derives its power from the law, ſhould put us under a neceſſity of doing ſomewhat which the law prohibits. Equity therefore will not decree tenant for life to commit a forfeiture. And ſo if 1000*l.* be bequeathed, to procure a dukedom to the head of the family, a bill will not lie for this; becauſe it is illegal to acquire honour for money. So a bill for an allowance for attendance at auctions, to enhance the price of goods, ſhall be diſmiſſed with coſts; for equity will never give countenance to demands of an unfair nature. But altho', where the party himſelf comes to be relieved againſt a *turpis contractus*, as a bond to a common harlot, the court may perhaps refuſe to interpoſe, for this court ſhould not be a court to examine ſuch

1 Vern. 5.

2 Vern. 187. 1 Vern. 484. Eq. C. Ab. 87. pl. 6.

ſuch matters: Yet where the plaintiff is only an executor, that varies the matter. It is true, the common law will not enquire into the conſideration of a bond; for matter *in Pais* may be avoided by averment, but not a deed. And there are only two ways of pleading to a bond, *viz.* to the lien, as dureſs, *&c.* to ſhew that it never did operate; or to the condition, to ſhew that it is defeated by matter of as high a nature; but Chancery will, and ſet it aſide if illegal.

Sect. 5. So the law will not imbolden the doing an illegal act, and therefore a condition againſt law makes all void. But this is to be underſtood of the doing ſome act that is *Malum in ſe*, then it makes the bond void; otherwiſe not, unleſs it be againſt a ſtatute; for a ſtatute is a ſtrict law, and the latter is ſo. And where a condition, by being againſt law, ſhall avoid a bond, the condition muſt be againſt law expreſly, *& in terminis terminantibus*, and not for matter out of the condition, as in bonds of reſignation, and the like, without an averment. Yet if the bond is general, for a reſignation ſome ſpecial reaſon muſt be ſhewn to require a reſignation, or the Chancery will not ſuffer it to be put in ſuit: If it ſhould not be ſo, ſimony will be committed without proof or puniſhment. But regularly, wherever there may be a way, to perform the condition, without a breach of the law, it is good. As a condition to alien in mortmain; becauſe there may be a licence.

1 Inſt. 206. b.

1 Leon. 73. 205. Godb. 29. Moor. 158. 1 Ab. E. c. 86.

Sect. 6. And this court will not meddle with play debts, or any ſuch things. However this is not to be underſtood ſo generally as it is ſpoken, but to mean, that the court will give * no countenance to exorbitant gaming; becauſe ſuch improvident hazards bring on the ruin of families. But the court has ſeldom denied to extend its relief againſt the gameſter himſelf, in behalf of the perſon injured; as where two men play on a joint

2 Vern. 173.

* P. 25.

ſtock, and one holds the ſtakes, and ſweeps up the money, he ſhall anſwer a moiety of that to his companion. And altho' equity will not uſually interpoſe in caſes relating to the gameing acts; becauſe it conſiders both winner and loſer equally guilty; and in taking upon them to game, they
2 Vern. 71. ſeem to renounce the benefit of the law: Yet even at law, in an action upon a wager, they have given the defendant leave to imparl from time to time; tho' in ſtrictneſs it is not prohibited by the common law. Much more ought equity to diſcourage it, becauſe the public is concerned, that men ſhould not miſpend their eſtates and time. And in the civil law, they allowed the loſer to recover his money again, even beyond the ordinary time of preſcription.

Sect. 7. As to the lawfulneſs of uſury, ſince damages may be demanded for tardy payment, why may we not bargain for ſomething certain beforehand, upon conſideration that our money is in another man's power; when we were not obliged for his benefit to venture the loſs, or to neglect the gain that might be made of it. And therefore in the *Roman* law, long before *Juſtinian*'s time, money might be lent at 12*l. per Cent.* which was called *Uſura Centeſima*, but not higher, except it was lent at great hazards; for the laws there preſcribed no bounds, any more than in certain conditional agreements. But in *England*, antiently the perſons of uſurers were puniſhed and the ordinary had cognizance of them in their life-time, to compel them to make reſtitution; and all their goods and lands eſcheated at their death to the king. And ſo odious was uſury, in the eye of the common law, that a man could not maintain an action upon an uſurious contract. But now ſuch uſury, as is allowed by the ſtatute, hath obtained ſuch ſtrength by uſage, that it will be a great impediment to traffick,

traffick, &c. if it ſhould be impeached. And altho' the ſtatute is to be taken ſtrictly, in order to ſuppreſs uſury, yet it muſt be between ſuch parties as make the corrupt agreement, and not to puniſh others who are not privy to it. There is alſo a difference between a bargain and a loan. For if the principal is in hazard, and the bargain is plain, it is not within the ſtatute of uſury. But it is otherwiſe of a loan; for then it is intended that the principal is in no * danger. However if it be found that he took 40*l.* by a corrupt ageement, tho' it be not within the ſtatute; yet judgment ſhall be given againſt him at common law. And in uſurious contracts, there is no doubt but equity will give relief to the borrower, in caſes where the law will not reach him; for it is unjuſt that the lender ſhould go away with ſuch exorbitant gains; and the borrower can never be conſidered as *particeps criminis*, but rather as one deſerving compaſſion than puniſhment; and tho' equity will not go directly contrary to an act of parliament, yet it will often apply a different remedy from what that preſcribes. * P. 26.

Sect. 8. But there are ſome ſorts of gaming and uſury not at all prohibited by law or equity; as in caſe of inſurances and bottomry-bonds, which are allowed for the encouragement of trade. Inſuring is, where a man for a certain ſum takes upon him the riſque that goods are to run in tranſportation from place to place. And a policy of inſurance muſt be conſtrued according to the uſage amongſt merchants, and the voyage ought to be according to the uſage. And the King's Bench takes notice of the laws of merchants, which are general, tho' not of particular uſages; for the law merchant is an univerſal law throughout all the world. But inſurances are for the benefit of traders and merchants only; and for this end were they at firſt introduced, that a merchant having a loſs might not be undone, many Salk. 445. 1 Vern. 269. Prec. Ch. 29 2 Vern 27

bearing the burthen together: Not that others unconcerned in trade, nor intereſted in the ſhip, ſhould profit by it. And the reaſon why a man having ſome intereſt in the ſhip or cargo, may inſure five times as much, is, becauſe a merchant cannot tell how much, or how little, his factor may have in readineſs to lade on board his ſhip.

Molloy 294. Skin. 153. 5 Co. 70.

Sect. 9. Bottomry, or *Fœnus nauticum*, is ſo called from the bottom of the ſhip, a part being put for the whole; for it is indeed in the nature of a mortgage of the ſhip; and this is allowed almoſt every where, by reaſon of the hazard of the lender, and it being found uſeful for navigation and commerce.

1 Ab. Eq. Ca. 372.

Yet a court of equity will never aſſiſt a bottomry-bond, which carries an unreaſonable intereſt; but will leave him to recover at law as well as he can.

2 Ch. Ca. 130. Skin. 262.

On the other ſide, if the obligor goes the voyage, he ſhall not be relieved here, upon pretence that the deviation was of neceſſity, ſaving as to the penalty.

2 Vern. 717.

And if the ſhip, tho' loſt, has deviated from the voyage mentioned in the bond; the obligee may recover * the money on the policy of inſurance, and alſo put the bottomry-bond in ſuit; for the inſurers might as well pretend to have aid of the bottomry-bond, as the obligor of the money recovered on the policy.

* P. 27.

Sect. 10. It was alſo a rule in the civil law, that marriage ought to be free, and the ſame policy has obtained in equity. And therefore in caſe of a

2 Vern. 102.

bond in common form for payment of money, but proved that the agreement was, that the obligor ſhould marry ſuch a man, or ſhould pay the money due on the bond: The court will decree this bond to be delivered up to be cancelled, as being contrary to the nature and deſign of marriage, which ought to proceed from free choice, and not from any compulſion. So wherever a mother or father,

2 Vern. 588, 652.

or guardian, inſiſt upon a private gain, or ſecurity for

for it, and obtains it of the intended huſband, it ſhall be ſet aſide; for the power of a parent or guardian ought not to be made uſe of to ſuch purpoſes. You ſhall not have my daughter unleſs you do ſo and ſo, is to ſell children and matches. And theſe contracts with the father, *&c.* ſeem to be of the ſame nature with brokage-bonds, *&c.* but of more miſchievous conſequence, as that which would happen more frequently; and it is now a ſettled rule, that if the father on the marriage of his ſon, takes a bond of the ſon to pay him ſo much, *&c.* it is void, being done by coercion, while he is under the awe of his father. 2 Vern. 392. Nor will the court only decree a marriage-brocage bond to be delivered up, but a gratuity of fifty guineas actually paid to be refunded; for ſuch bond is in no caſe to be countenanced. 1 Ab. Eq. Ca. 90. And a bond to procure marriage, tho' between perſons of equal rank and fortune, is void; as being of dangerous conſequence. Sho. Par. Ca. 76. So if *A.* being a widow gives a bond to *B.* of 20*l.* if ſhe ſhould marry again, and *B.* gives a bond to the widow to pay her executors the like ſum, if ſhe did not marry again: And the widow ſoon after marries, her bond will be decreed to be delivered up. 2 Vern. 215. And the difference which ſome take, where it is a bond penal, whereon the jury can give no leſs than the penalty, and the caſe (of a promiſe) where the jury will, as cauſe is, leſſen, *&c.* ſeems not to be law; but the agreement void in both caſes. And ſo in reſtraints of trade, the diſtinction is not between bonds and promiſes, as is laid down in ſome books; but it is between bonds, covenants or promiſes with conſideration and ſuch as are without: For the firſt, if only with reſpect to a particular place or perſon, may be juſt and reaſonable; nor is it * againſt *Magna Charta*; for that only provides againſt power and force, that a man be not diſſeiſed of his liberty or eſtate, but he may ſell either. 1 Wms. 194. 195. Francis and Nigate in C. P. Tr. 11 G. 2.

* P. 28.

Whereas

Whereas the other, for ought appears, may be oppreſſive, and is of miſchievous conſequence to the public.

Sect. 11. And in the civil law, counter-letters, and all ſecret acts which make any change in agreements, are of no manner of effect, with reſpect to the intereſt of a third perſon; for this would be an infidelity contrary to good manners and the public intereſt. So private agreements in derogation of marriage-articles are all ſet aſide in equity. As
1 Salk. 156. where the daughter promiſed to repay 10*l.* part of the marriage-portion of 90*l.* this is a fraudulent and void promiſe. So where *A.* having a kindneſs
1 Vern. 241. for *B.* treated a marriage for him with *C.* for his niece, and a ſettlement being agreed upon for 2500*l.* portion, he obtained a redemiſe of part of the eſtate ſettled for preſent maintenance, and a releaſe of what (*A.*) had covenanted to ſettle after
1 Vern. 475. his death; and both ſet aſide in equity. So where the brother gave a bond to make up his ſiſter's portion the ſum that was inſiſted on, but took a bond from her before marriage to repay. The huſband died, the wife ſurvived, and was relieved
1 Vern. 500. againſt the bond. From which caſes it may be collected, that that which is the open and public treaty and agreement upon marriage ſhall not be leſſened, or any ways infringed, by any private
2 Vern. 764. Prec. Ch. 522. 1 P. Wms. 496. treaty or agreement. And that, which was once a fraud, will always be ſo; and the woman ſurviving the huſband will not better the caſe, nor the aſſignment of ſuch a bond to creditors; for a bond, aſſignable only in equity, is ſtill liable to the ſame Equity, as if remaining with the obligee; and as to any promiſe made afterwards to pay it, that was
2 Ch. Rep. 81, 79. 2 Vern. 17. but *nudum pactum*, and not binding. So a ſettlement made by a woman before her marriage, for her ſeparate uſe, without the huſband's privity, ſhall not bind the huſband; being in derogation of the

the rights of marriage. But where a widow, before her marriage with a ſecond huſband, aſſigned over the greateſt part of her eſtate to truſtees for children by her former huſband; it is certain a widow might with a good conſcience, before ſhe put herſelf under the power of a ſecond huſband, provide for the children ſhe had by the firſt. 1 Vern. 408. 2 P. Wms. 358, 674.

Sect. 12. And, by the civil law, whatever debtors do to defeat their creditors is void, and there is a great reſemblance between the civil law in this matter and the ſtatute of 13 *El.* * But in each of them there was this exception, that it ſhould not extend to avoid any eſtate or intereſt, *&c.* made upon a good conſideration and *bona fide*. So that both muſt concur; for equity requires that the deed that defeats another ſhall be made of as high a conſideration, as the thing is that is defeated by it. And therefore if a man ſteals a young lady, who has a conſiderable fortune in truſtees hands, and the huſband gives a judgment to make a ſettlement upon her, equity will not ſet this aſide in behalf of creditors, tho' the ſettlement was after marriage, and voluntary; for the court would not have let the huſband have had the fortune without making a ſettlement. And the ſtatute did not mean to alter the nature of the debt: So that if the debt do not bind the heir, but merely the perſonal aſſets, it will not affect a volunteer with power of revocation, unleſs reduced to a judgment during the life of the debtor. And even a debt that does affect the heir will not bind a purchaſer of the volunteer with notice, till it is placed upon the land by the judgment; for if it were otherwiſe perſonal ſecurity would be turned into real ſecurity. And ſome think that fraudulent conveyances are made ſo only by the ſeveral ſtatutes made for that purpoſe. And therefore if the debtor makes a purchaſe in truſtees names, he may declare the truſt to whom he pleaſes; for

* P. 29.

Prec. Ch. 22.

2 Vern. 490.

for he might have given him the money to have made the purchaſe himſelf, and it is a new pretence to ſay a man made a purchaſe fraudulently. But altho' regularly for caſes within the ſtatute, relief muſt be had at law; yet if goods are given to defraud creditors, in ſuch a caſe as the gift is not avoidable by the ſtatutes, the party may be relieved here; for this Court determined concerning charities and frauds long before any ſtatute made concerning the ſame.

2 Vern. 262. Prec. Ch. 14.

Sect. 13. And theſe ſtatutes made againſt frauds are for the public good; and therefore to be taken by equity, and bind the king. And the word (declare) in the act of 13 of *Eliz.* ſhews it was the common law before. Nor does that act extend only to creditors, but to all others who have any cauſe of action or ſuit, or any penalty or forfeiture either to the king or the ſubject, as for felony, outlawry, recuſancy, or the like. But there is a difference between purchaſers and creditors. For the ſtatute of 13 *El.* makes only fraudulent conveyances void againſt creditors; but in the caſe of a purchaſer, all voluntary conveyances are void by the expreſs letter of the 27th of *Eliz.* without more. And the notice of * the Purchaſer, *viz.* of the fraud, cannot make that good which an act of parliament makes void, for they are always fraudulent againſt purchaſers. And therefore any perſon coming in by a voluntary conveyance, and purſuing a purchaſer at law, ſhall be obliged to diſcover his title in a court of equity; for elſe he might be put to encounter evidence he never heard of. But he that would have benefit of this act ought to be a purchaſer *bonâ fide*, and in vulgar intendment, *viz.* for a valuable conſideration, as a leſſee at a rack-rent, tho' he paid no fine, becauſe he is bound to pay his rent during the term, whether the land is worth it or not. And this ſtatute is very well penned; for

5 Co. 60. * P. 30.

2 Vern. 327.

for the words of the act are general, and whoever ſells it, the purchaſer ſhall avoid ſuch fraudulent eſtate, *&c.* So where a man in a ſecret manner made an eſtate to the uſe of his wife for her jointure by fraud and covin, to defeat a purchaſer to whom he intended to ſell the land; if the fraud be proved in evidence, or confeſſed in pleading, the purchaſe ſhall avoid the eſtate.

Sect. 14. And where upon the ſtatute of fraudulent deviſes it has been objected, that that ſtatute being introductive of a new law, the relief upon it ought to be at law. Yet equity will alſo give relief. As where the heir having aliened the real eſtate, a bond-creditor brings a bill againſt him and the purchaſer. But altho' by that ſtatute, a man is prevented from defeating his creditors by his will: Yet any ſettlement or diſpoſition he ſhall make in his life-time of his lands, whether voluntary or not, will be good againſt bond-creditors; for that was not provided againſt by the ſtatute, which only took care to ſecure ſuch creditors againſt any impoſition which might be ſuppoſed in a man's laſt ſickneſs; but if he gave away his eſtate in his life-time, this prevented the deſcent of ſo much to the heir, and conſequently took away their remedy againſt him, who was only liable in reſpect of the lands deſcended; and as a bond is no lien whatſoever in the hands of the obligor, much leſs can it be ſo when they are given away to a ſtranger.

4 & 5 W. and Mar. Prec. Ch. 198. Ab. Eq. ca. 149.

Sect. 15. So if a freeman makes a gift of any part of his perſonal eſtate in his life time, or if he turns all his eſtate into a purchaſe of land, he may diſpoſe of this as he thinks fit. So if money be given by a freeman to be laid out in land, and ſettled, *&c.* or if a freeman upon a ſecond marriage conveys leaſes in truſt, *&c.* and in the ſettlement there is an agreement, that the truſtees ſhould ſell theſe leaſes, * and inveſt the money in the purchaſe of lands of inheritance to be ſettled to uſes: By the agreement,

1 Vern. 277, 612. Preced. in Chan. 596. 1 Vern. 345. 2 Ch. ca. 118. 2 Vern. 665.

* P. 31.

theſe leaſes are now to be conſidered in equity, as if a purchaſe had been actually made, and the freeman had paid the money out of his pocket.

Sect. 16. But the cuſtom of *London* muſt be entirely given up, if equity would not aſſiſt to ſet
2 Vern 612. aſide conveyances in fraud of the cuſtom. And therefore where a freeman had not altogether diſmiſſed himſelf of the eſtate in his life-time, and the deed being made when he was languiſhing, and but a little before his death, it ought to be looked upon as a *Donatio cauſa Mortis:* But will ſtand good as to a moiety, which he having no wife might diſpoſe
2 Vern. 277. of. So if a man has it in his power, as by keeping the deed, *&c.* or if he retains the poſſeſſion of
1 Ch. Rep. 84. the goods, or any part of them. Or if there be a
2 Vern. 685. deed of truſt to the uſe of his will, or to pay any ſum as he ſhould appoint, and he makes an appointment by deed and will, this will be deemed fraudu-
2 Vern. 98. lent and void. So if a man poſſeſſed of a term for years, voluntarily aſſigns it as a proviſion for his child: Yet his wife ſhall have her cuſtomary ſhare.
2 Vern. 202. So a voluntary judgment ſhall not prevail againſt
Prec. Ch. 17. debts by ſimple contract, nor againſt the widow of a freeman; but his debts being paid, the judgment will bind the legatory part. And altho' the father cannot diſpoſe of the cuſtomary part from his chil-
1 Lev. 227. dren, yet he may by his will appoint, that if one dies before twenty-one, another ſhall have his part.
1 Ch. Ca. 199. Yet he cannot deviſe his child's part over to another, in caſe that child die in minority. But ſee now the late ſtatute 11 *Geo.* 1. *cap.* 18. which has made a great alteration in theſe matters.

Sect. 17. We are likewiſe unable to oblige ourſelves to any performance about the goods or actions of other men, not ſubject to our diſpoſal; and therefore no man's contract can be carried into execution in equity, any further than his intereſt or lawful power extends. For equity will not de-

cree

cree a man to commit a wrong to a third perſon, as to compel a tenant for life to make a diſſeiſin, or forfeiture, of his eſtate; or to bind one who claims paramount, as to decree an agreement of one joint-tenant againſt the ſurvivor; or to compel a free-holder of a manor to conſent to an incloſure or ſtint of a common, unleſs the bill charge that he would be benefited by it. But becauſe it would be inconvenient, that an engagement ſeriouſly entered into ſhould be of no effect, the law ordains, that he who undertakes for another, or makes a * contract in his name, ſhould procure a performance from him, or ſtand in his ſtead. As if *A.* articles on the behalf of *B.* to purchaſe four houſes in *Jamaica*, and, pending the ſuit to compel the ſeller to make a good title, the houſes are ſwallowed up by an earthquake: Yet *A.* ſhall pay the money, altho' he has not ſufficient effects of *B.*'s in his hands. * P. 32. 2 Vern. 280.

Sect. 18. And if a third perſon treats for one that is abſent without his order, but undertakes for his conſent, the abſent party does not enter into the covenant till he ratifies it: and if he does not ratify it, the perſon who undertook for his conſent, only, ſhall be bound. As if *A.* and *B.* inſolvents, apply to a ſcrivener, who had procured 200*l.* for *A.* upon their bond to *C.* and *D.* to compromiſe the debt, and the ſcrivener tells them that *C.* and *D.* would ſtand to any thing that he did, and accordingly compounds it with them: Yet *A.* and *B.* ſhall pay *C.* and *D.* their whole money, they not being any way privy to the agreement, and the ſcrivener ſhall repay them, and indemnify them according to the agreement, tho' he acted only as an agent. So if *A.* by writing, agrees with *B.* and *C.* to pave the ſtreets in a pariſh, and they in behalf of the pariſh agree to pay him for it, and this writing is lodged in the hands of *B*; if *A.* paves the ſtreets, he muſt have 2 Vern. 127. Hard. 205.

have relief againſt the undertakers, and the undertakers muſt take their remedy over againſt the pariſh; and more eſpecially in this caſe, the written agreement, which is his evidence, being in the hands of one of them. On the other ſide, where a man acts in execution of the authority given him by another, either expreſly or impliedly; then it is by relation the act of that other, and he acquires no right, nor brings any obligation upon himſelf. Yet if a verdict is obtained againſt an agent or truſtee, equity will not relieve againſt ſuch verdict; but will decree that he ſhall be re-imburſed by his principal, and ſtand in the place of the creditor.

6 Co. 40. a. Co. Lit. 21. 2 Inſt. 335. Moor. 155. 1 Vent. 299. 2 Mod. 131.

Sect. 19. The ſtatute *de donis conditionalibus*, made 13 *Ed.* 1. in a manner created perpetuities; for by that ſtatute the tenants in tail could do no act in prejudice of the iſſue, but the will of the donor was to be obſerved, and the ſame law continued about 200 years. But in 12 *Ed.* 4. it was reſolved by the judges, that by a common recovery, the eſtate-tail ſhould be barred; for the miſchiefs that were introduced in the common wealth thereby. And by 4 *H.* 7. *cap.* 24. a fine had the ſame force given it, as to iſſue in tail, tho' it did not extend to him in remainder, without he neglected to * make claim within five years after it fell into poſſeſſion.

* P. 33.

2 Vent. 350

And this court will not ſuperſede fines and recoveries, as to make a bargain and ſale of tenant in tail of a legal eſtate good againſt the heir; for he is, ſince the ſtatute, to be conſidered as a purchaſer, and is in immediately from the donor *per formam Doni*. So that as it ſeems, no act of tenant in tail ſhall be carried into execution in a court of equity againſt the iſſue any further than at law; for this would be to repeal the ſtatute *de donis*.

Hob. 203.

1 Ch. Ca. 271. 1 Lev. 239. 2 Vern. 306 1 E. Ab. 19, 25. 2 Vern. 35, 50, 253.

But if the iſſue enters, and accepts of the agreement, it becomes his own, and ſhall bind him. And any agreement with an equivalent will bind the

the iſſue, as a partition, tho' but by parol. Nor will the court aid the iſſue in tail againſt a diſcontinuance, tho' by a voluntary conveyance; ſo far does it favour the owner of the inheritance who has power to diſpoſe of it.

Sect. 20. As for a truſt or equitable intereſt it is a creature of their own, and to be governed by their rules. For an intail of a truſt is not within the ſtatute *de donis*, and therefore may be alien'd without a recovery by any manner of conveyance. Yet ſome have thought the method of common recoveries a very prudent and political inſtitution, and fit to be followed in equity, that men may have ſome reſtraint from overturning the ſettlements of their family.

2 Vent. 350
2 Ch. Ca. 71
2 Vern. 132
1 Vern. 440
1 Vern. 13.
2 Ch. Ca. 78
2 Vern. 226
344.

Sect. 21. So the head of a corporation aggregate, as a dean, *&c.* alone, cannot make a leaſe or diſcontinuance; for it ought to be by the entire corporation, or elſe it is void, except of the poſſeſſions, which they have ſevered from the reſt of the corporation. But an abbot or biſhop may diſcontinue, for they are ſole ſeized in fee, *&c.* Otherwiſe of a parſon, for he is not ſeized in fee to every intent. And a deed of an abbe *ex aſſenſu Capituli*, is good; becauſe they are dead perſons in law. Otherwiſe of a deed of a dean *ex aſſenſu Capituli*; for his chapter is parcel of the corporation, and ſeized with the dean, and ſhall plead and be impleaded with him. So, of a mayor and commonalty. But in all incertain bodies, as mayor and commonalty, *&c.* if the greater part do an act, this ſhall bind, altho' the reſt will not agree, and the aſſent may be tried by voices or hands; *Quia ubi major pars ibi tota:* Elſe they might never all agree.

Co. Litt. 325
342.
Dyer. 239.
1 Ro. Ab.
633.

Sect. 22. And a corporation is in divers reſpects as one body, or as ſeveral perſons, and may charge and be charged accordingly. The deed therefore, of a corporation ſhall not bind them in their pri-

vate

* P. 34. 1 Lev. 237. Sed. vide 2. Vern. 396 Cont. vate capacity, if it be made in the * name of their corporation; neither can they be charged in their private capacity with debts of the corporation, altho' they are diſſolved. So they ſhall be intended ſeized in that capacity by which name they are named; and when the mayor or other head of the corporation is in priſon, touching his office for a bond made by him and the commonalty; this is an impriſoment to him as mayor. So if a corporation be changed, yet they ſhall not be diſcharged of covenants, annuities, and the like, with which they were before bound. And by the ſame reaſon they ſhall retain the land and poſſeſſions which they had before; and ſo debts due to them remain. But if the corporation be diſſolved, the donor ſhall have his lands again.

21. Ed. 4. 5 9. 4 Co. 87. b. 3 Lev. 238. 1 Inſt. 13. a. 1 Rol. Ab. 816. 1 Roll. Ab. 375.

Sect. 23. It is alſo againſt a maxim in law, that a feme covert ſhould be bound without a fine: So that a fine is neceſſary for the diſpoſing of her lands in fee, or of freehold. The Common Law therefore gave her a *Cui in vita* after her huſband's death, for the recovery of the land aliened by him; and to the heir a *ſur Cui in vita*. And in all caſes, where the wife might have a *Cui in vita* at Common Law, ſhe may enter by the ſtatute of 32 *H.* 8. *cap.* 28. And where the iſſue cannot have a *Sur cui in vita* or formedon, there he ſhall not enter within the remedy of this ſtatute; as during the life of the huſband. For the words of the act are, *According to their Rights and Titles therein, viz.* be it in the life of the huſband after a divorce *a Vinculo Matrimonii;* (for then at Common Law a *Cui ante Divortium* lay) or after his death. And ſo in equity, no agreement of the huſband to part with the wife's inheritance ſhall bind the wife, or be carried into execution. But if the wife upon private examination conſents, the court will decree an agreement of the huſband to convey his wife's land. Yet the bill muſt regularly

Fitz. Ab. tit. Grant.

2 Vern. 61.

ly be brought againſt them both; for the wife ought not by law to convey by any compulſion from the huſband, as it will otherwiſe be intended that ſhe does. And if a feme covert agrees to ſell her inheritance, ſo as ſhe may have part of the money, and the land is accordingly ſold, and her part of the money put into truſtees hands: This money is not liabel to the huſband's debts, tho' ſhe afterwards agree that it ſhould be ſo; nor ſhall any promiſe made by the wife for that purpoſe, ſubſequent to the firſt original agreement, be obliging on that behalf. 2 Vern. 64.

* *Sect.* 24. Neither will equity take away the benefit of ſurvivor from the wife, of ſuch things as the law has caſt upon her, as money, or the like, in truſt, altho' the huſband make her a jointure: Unleſs it be full and adequate to her fortune. So chattels real in poſſeſſion ſurvive to the wife, except the huſband diſpoſe of, or forfeit them during the coverture and he cannot charge or deviſe them, for the title of the wife is paramount. But a demiſe of the wife's term, tho' but for a fortnight, will alter the property. So things merely in action ſurvive to the wife; unleſs recovered during the coverture, or diſpoſed of by him upon a valuable conſideration. But an award of a ſum of money is a ſort of judgment, and changes the property of a legacy in her right. And ſo if the huſband recover it, as he may without joining his wife; for wherever the huſband is to have the thing alone when recovered, there he need not join his wife. Yet of things merely in action belonging to the wife, ſhe ought to join in ſuit. And a covenant to pay it to the huſband, is but a collateral ſecurity, and does not alter the nature of the debt, but it ſhall ſurvive to the wife. But it is a rule in all caſes, that where a man makes a ſettlement equivalent to the wife's portion, it ſhall be intended that

* P. 35. 2 Vern. 168. Co. Lit. 46 351. Co. Litt. 351 3 Mod. 186. 1 Vern. 396. 2 Vern. 302.

that he was to have the portion tho' their was no agreement for that purpoſe; the wife ſhall not have her jointure and fortune both, but the law of this court will preſume a promiſe.

Sect. 25. And it is a common maxim, that he, who has the precedency in time, has the advantage in right. Not that time conſidered barely in itſelf can make any ſuch difference, but becauſe the whole power over a thing being ſecured to one perſon, this bars all others from obtaining a title to it afterwards. ſo in equity, where one party has no more equity than the other, the law muſt take place; and therefore where it is voluntary conveyance againſt voluntary conveyance you muſt try it at law. And as a voluntary conveyance cannot be revoked without a power of revocation, ſo the reaſon is the ſame where it is not purſued; becauſe the law has been liberal in expounding powers of revocation favourably, and where the law expounds a thing according to an equitable conſtruction, there is no reaſon for equity to extend it further. For it is a law which a man puts upon himſelf as a guard againſt ſurprize, and therefore ought to be performed in all neceſſary circumſtances. But if there appear other equitable conſiderations, it would be convenient to give relief, * where there is a defect in the execution of a power, and an intention plain to do it, as well as to ſupply a defect in a conveyance; for it is *pro tanto* part of the old dominion. As *1ſt*, where there is a conſideration either valuable or foreign, as for payment of debts, or proviſion for children, and no better on the other ſide. *2dly*, where there is any fraud, or the party is guilty of any deceit or falſhood, by which the execution is prevented: for he in the remainder ſhall not take advantage of his own wrong. *3dly*, accident or an impoſſibility of complying with the circumſtances, ſince it would be unconſcionable in the remainder-man to take advantage of theſe, provided he

3 Ch. Ca. 88. 93.

1 Vern. 100. 464.

3 Ch. Ca. 126.

3 Ch. Ca. 89.

* P. 36.

1 Ch. Ca. 10.

1 Ch. Rep. 185.

1 Eq. Ab. 342.

he does all he can. And ſo in other caſes of powers, as to make leaſes, equity will relieve the defective execution of them, where there is any fraud or accident, or a valuable conſideration. But there is a great difference between a defective execution of a power, and where the power was not executed at all: Eſpecially if the power be general, it is not ſuch a lien upon the lands as ſhould affect a purchaſer, tho' it had been afterwards executed. Nor has the court gone ſo far, as where a man has a power to raiſe, if he neglect to execute that power, to do it for him, altho' it might be reaſonable enough, and agreeable to equity in favour of creditors.

1 Ch. ca. 10, 185. 1 Vern. 407. 2 Vern. 69. 1 Vern. 465.

Sect. 26. And it often falls out, that even not to keep one's promiſe ſhall be juſt. For all muſt be referred to the fundamental rules of Juſtice: As 1*ſt*, That no man be wronged, and 2*dly*, that the public good be as far as poſſible promoted. Hence, if the agreement is extremely unreaſonable and iniquitious, equity will not carry it into execution. As where the daughter and her huſband would have more than the father indebted, and the mother and two daughters unpreferred would have left. But altho' a written agreement being unreaſonable, the court will not carry it into execution; yet they will decree, that it be delivered to the perſon for whoſe benefit it was deſigned, that he may have an opportunity to make the moſt of it at a trial at law.

2 Ch. Ca. 17.

Sect. 27. *Laſtly*, the court will not encourage the laches and indolence of the parties, but will preſume, after great length of time, ſome compoſition or releaſe to have been made: Since it would be too hard to force a man to keep his evidence by him for ever. And therefore a legacy ſhall be preſumed to be paid after great length of time: As where the teſtator has been dead forty years. So when a contract * has lain dormant many years,

2 Vern. 21.

* P. 37.

there ſhall be no ſpecifick performance. But ſpecial circumſtances may alter the caſe. As if there are articles upon marriage to purchaſe lands, and to ſettle them within three years, theſe ſhall not be waved by length of time, if the covenantor has been in trade, and could not conveniently ſpare money. And altho' a ſleeping mortgage, or bond, ſhall be preſumed to be diſcharged, and not ſubſiſting, if nothing appears to the contrary, as by payment of intereſt, or a demand made, or the like: Yet a will has been ſet aſide after forty years poſſeſſion under it, and even in prejudice of a purchaſer, upon account of the inſanity of the deviſor.

1 Ch. Rep. 78, 88, 106.

CAP. V.

What is a ſufficient Conſideration to make an Agreement binding.

Sect. 1. LET us now inquire, what ſhall be deemed a ſufficient conſideration, to make a pact or covenant valid. For altho' in donations, and ſuch like contracts, where there is no apparent conſideration, the bare pleaſure of doing good to others ſtands in the place of a cauſe, on the part of the perſon who receives the benefit, and gives nothing: Yet there is a difference between a gift perfected, and executed by livery in the life-time of the parties, and a bare promiſe to give, or a gift imperfect and executory. And even ſince the ſtatute of 3 & 4 *Ann. cap.* 7. a note is but evidence of a conſideration, which it was not before, and turns the proof on the defendant the drawer, that there was no conſideration. But the acceptor and indor-

ſor

ſor of a bill of exchange are bound to pay without a conſideration: becauſe in commerce we are governed by the law of nations, as they are in other countries, and that law is ſo for the encouragement of trade. And the reaſon of this caution in the law, not to enforce a naked agreement, was not becauſe ſerious promiſes do not of themſelves bind in the law of nature; but that the ceremony of ſolemn forms might put men upon conſideration; as alſo to prevent a multiplicity of ſuits. The court therefore will pay that faith and deference to the ſolemnity of deeds, and to inſtruments without blemiſh, as to intend them at leaſt the acts of reaſonable men, and ariſing from a good conſideration, unleſs the contrary be proved: And in the Civil Law this exception was not allowed after two years.

Sect. 2. But regularly, equity is remedial only to* thoſe, who come in upon an actual conſideration. So that altho' a voluntary conveyance, which is good in law, is ſufficient likewiſe in equity: Yet a voluntary defective conveyance, which cannot operate at law, is not helped here in favour of a bare volunteer, where there is no conſideration expreſſed or implied. But there is no doubt, that in the caſe of a purchaſer, the want of a ſurrender of a copyhold, or the like, ſhall be ſupplied. And ſo in caſe of a creditor, or proviſion for payment of debts. And there having been precedents already of relief, where it is a proviſion for children, it is beſt to make the rule uniform, and to ſtick to a rule; and there ought not to be one ſort of equity for an eldeſt and another for a younger ſon.

* P. 38.

2 Vent 365.
2 Vern. 40.
1 Vern. 37.
2 Vern. 163.
1 Vern. 40, 132.
1 Ch. Ca. 264.
2 Vern. 165.
2 Vent. 365
1 Vern. 132

Sect. 3. And in equity there muſt not only be a conſideration, as a motive for relief, but it muſt be a ſtronger conſideration than there is on the other ſide; for if it was only equal, then the balance would incline neither way, but matters muſt be left

in the ſame ſituation, as they are in at preſent. And therefore where it is ſaid, that Chancery will help a defective aſſurance, if intended as a proviſion for younger children; this is always to be underſtood where the heir has ſome proviſion made for him. For the proportion is to be left to the prudence of the father, and equity will then ſupply the circumſtantial part in ſupport of the father's providence for the welfare of his family, which he is by nature bound to take care of. But where he is deſtitute of all proviſion, there the reaſon is changed more ſtrongly on the other ſide, that the Court of Equity ſhould not interpoſe to deprive him of the advantage which he has at law. And ſo if one deviſes his copyhold, being borough Engliſh, to his eldeſt ſon, and deviſes houſes to his younger ſon, and the houſes are ſoon after burnt, and are never entered upon by the younger, the court, as this caſe is circumſtanced, will not ſupply the want of a ſurrender. And altho' againſt a ſtranger, who comes in with notice, or without a conſideration, equity may ſupply the want of a legal conveyance; yet it never will againſt him, who is a purchaſer for a valuable conſideration without notice; for when both are in equal equity the legal title takes place.

1 Salk. 187.

2 Vern. 163, 265.

Sect. 4. As to the effect of covenants therefore to paſs with the lands, when the aſſignee is a purchaſer for a valuable conſideration without notice, equity will follow the law. * As in caſe of a leaſe of a fair or wine-licenſe for years, rendering rent, *&c.* a purchaſer ſhall not be charged with the rent; becauſe perſonal things are not in the law intended to reach the aſſignee. So mere collateral covenants, which do not touch or concern the thing demiſed in any ſort, bind only the covenantor, and his executors or adminiſtrators, who repreſent him. But covenants that run with the land, that is, which extend

* P. 39.

5 Co. 15.

1 Rol. Ab. 521.
Cr. Eliz. 457
Moor 399.
5 Co. 24.

extend to ſomething *in eſſe*, parcel of the demiſe, and affect the eſtate, lie between all thoſe who are privy in tenure or contract, tho' not named, like debt for rent at Common Law. And the reaſon is; becauſe uſually the rent is more or leſs accordingly, *& qui ſentit commodum ſentire debet & onus.* So a collateral covenant to be done upon the land, as to build *de novo*, ſhall bind the aſſignee by expreſs words; becauſe he is to have the benefit of it. And a covenant to renew in conſideration of improvements, a purchaſer of the inheritance ſhall make good. 5 Co. 15.

Sect. 5. But in caſe of covenants, that run with the land, if the circumſtances are hard, equity will not decree them *in Specie*, even againſt thoſe who are bound by them at law. And therefore, altho' it is the mortgagee's own folly to take an aſſignment of the whole term, whereby to ſubject himſelf to the covenants in the original leaſe, and not to take a derivative leaſe of all the term, but a month, or a week, or a day, as he might have done: Yet where he is only a mortgagee, who never was in poſſeſſion, the Chancery will not aſſiſt to charge him, but leave the leſſor to recover at law, as well as he can. But if the leſſor recovers at law againſt one as aſſignee, the rent reſerved on the leaſe, who had never entered; equity will not deprive him of this advantage at law. And in ſome caſes, equity will give the leſſor a remedy where he had none at law. As if leſſee for years makes an under-leaſe in truſt for *J. S.* the leſſor may compel *J. S.* in equity to repair. But this is only where the executors of the firſt leſſee are inſolvent; for tho' the privity of eſtate is deſtroyed in law, yet he ſhall not have recourſe to this remedy, whilſt he has any left againſt the executors of the firſt leſſee. 2 Vern. 275, 276. 2 Vern. 374. 1 Vent. 88. Qu.

Sect. 6. So in caſe of a fraud, equity will extend their relief in favour of the leſſor. And therefore altho' 2 Vern. 423.

altho' regularly this court will only decree an aſſignee of a leaſe to pay the rent become due ſince the aſſignment, and which ſhall become due while he
*P. 40. continues in poſſeſſion, but not during the * continuance of the leaſe; for he may, if he can, get rid of the leaſe by aſſigning it to another: Yet there is this difference taken, if the aſſignees have continued long in poſſeſſion, and the premiſſes are worſted, and become ruinous under their hands, or by their means, there the aſſignment to a beggar would be conſidered to be a fraud to get rid of the damage, which they ought to anſwer. But if they aſſign immediately after their coming into poſſeſſion, there is no ground to relieve; becauſe the aſſignee was not chargeable at law, and the leſſor had his original ſecurity againſt the leſſee and his executors unim-
*Vern. 88. peached. But where a man makes a leaſe rendering rent, if the leſſee aſſigns to a beggar or inſolvent perſon, in equity the leſſee ſhall be bound to pay the rent, which is a common caſe; and even at law the firſt leſſee by his expreſs contract may be charged in debt for rent after aſſignment. And for the ſame reaſon it is, that in debt for rent upon a leaſe for years, the plaintiff need not ſet forth any entry or occupation, as upon a leaſe at will, it being due upon the leaſe or contract, and not by the occupation, as in the other caſe.

Sect. 7. But there is a difference between covenants, advowſons, common, and the like, annexed to the poſſeſſion of the land, which paſs with it into whoſe-ſoever hands they come, and an uſe or warranty, or ſuch like things annexed to the eſtate of the land in privity. For to all uſes there muſt be confidence in the perſon, and privity of eſtate either expreſſed or implied; and the implied confidence is, where a man comes in with notice or without a conſideration. And even a ſpecial covenant to ſettle lands, binds the conſcience only, and not

not the land itſelf: Yet a general covenant will bind as ſtrongly. And if it appear judicially to the court, that he could not properly perform or make election; as if the time of ſettlement were paſt, and he aged or the like; the court may apply the general covenant on his particular lands, and chooſe for him. So where *A.* on the marriage of his ſon covenants for himſelf, his executors and adminiſtrators (without naming his heirs) within one month after the marriage to ſettle lands of 150*l. per Ann.* on the ſon and the iſſue of the marriage, but dies before any ſettlement made, the ſon enters upon the real eſtate as heir to his father, and ſettles it for the jointure of a ſecond wife who has no notice of the articles; the articles ſhall be a lien on the lands whereof the father was then ſeized, tho' no particular lands were mentioned in the articles, unleſs he * had purchaſed and ſettled other lands within the time limited by the articles, and which were not ſettled on the ſecond wife, who came in as a purchaſer without notice. So if a man covenants or enters into bond to ſettle land of ſuch a value, or an annuity out of land of ſuch a value, and has no land at the time of the ſettlement, but afterwards purchaſes land, that land ſhall be liable, and that againſt a voluntary deviſee.

2 Vern. 482.

* P. 41.

2 Vern 97. Took and Hastings.

Sect. 8. And as a covenant without a conſideration is null, it is the ſame thing, if the cauſe or conſideration happen to ceaſe. So that in all reciprocal contracts, there is a warranty on both ſides in equity, tho' not at law. But a difference has been taken between a bargain for a place, where the party may be removed at pleaſure, and a bargain of land of a defeaſible title: Yet ſeeing the king has not diſallowed ſuch bargains, as it were to be wiſhed he would, they occaſioning deceit to the king, *&c.* the purchaſer ſhall not loſe his money; and therefore what the ſeller has received he ſhall repay.

2 Ch. ca. 83.

repay. So if in a ſale of goods, the buyer pays money in part of ſatisfaction, and afterwards the whole value of the goods is recovered againſt him at law; the money ſo paid upon that account, becomes money received for the uſe of him that paid it; and he may recover it in an action at law. So if *A.* ſells land to *B.* who afterwards becomes a bankrupt, part of the purchaſe-money not being paid, in this caſe there is a natural equity, that the land ſhould ſtand charged with ſo much of the purchaſe-money as was not paid, without any ſpecial agreement for that purpoſe. So where the huſband had bound himſelf to ſettle an annuity upon his wife during her widowhood, and ſhe had conveyed her eſtate to her huſband; in both deeds there was a power of revocation, and they were both in the cuſtody of the wife: After the huſband's death ſhe conceals the deed by which ſhe conveyed her own eſtate; and after many years, when the arrears of the annuity would be worth more than her own eſtate, ſhe ſets up the bond; this ſhall not prevail: For the cauſe of granting ſuch annuity was not ſubſiſting.

1 Vern. 267. Sed. vide 2 Vern. 281. Contra.

Sect. 9. In the matter of rents, the law of *England* is, *ex vi termini*, ſtricter in them than other nations; for *redditus* and *reddere* is the ſame as *reſtituere*; and theſe words, *reddendo inde* or *reſervando inde*, are as much as to ſay, that the leſſee ſhall pay ſo much of the iſſues and profits at ſuch days to the leſſor. And therefore it is not due or payable before the day, and if the land be evicted or leaſe determined before, * no rent ſhall be paid; for there ſhall never be any apportionment in reſpect of part of the time, as upon eviction of part of the land. But altho' rent-ſervice was not apportionable, any more than rent-charge, till the ſtatute of *Quia Emptores terrarum*, which being made only for the benefit of the lord, does not extend

* P 42.

1 Inſt. 148. 1 Roll. Ab. 234.

extend to rent charge or ſeck: Yet it ſeems at Common Law, rent-ſervice might be apportioned by the act of God, or the Law, tho' by the act of the party it was otherwiſe. And by the ſame reaſon in conſcience, if a man be ignorant that he hath ſuch a rent out of the land, which is *ignorantia facti*, or that the law would extinguiſh his whole rent by a purchaſe of part of the land, which is *ignorantia juris*; even a rent-charge ſhall in ſuch caſe be apportioned. 1 Ro. Ab. 235, 236.

CAP. VI.

Of the Execution of the Agreement.

Sect. 1. IT remains in the laſt place, that we ſpeak of the execution of the agreement. And 1*ſt.* that we inquire, what ought to be done on the part of him who ſues for a performance. For when a man takes upon him any duty, not abſolutely *gratis*, but upon the proſpect of the other's doing ſomething on his ſide; the obligation to make good his undertaking is only conditional. And therefore in the Law of nature, it is a general rule, that the particular heads of a contract are in the place of ſo many conditions; and in conditions all things remain, before they are accompliſhed, in the ſame ſtate as they were in by the covenant. So at Common Law, in executory contracts, *pro* makes a condition precedent, except in ſome ſpecial caſes: As 1*ſt*, Where a day is appointed for the performance, and the day is to happen before the thing can be performed on the other ſide. 2*dly*, Where they are mutual and diſtinct covenants, and not one in conſideration of the other. 3*dly*, Where the co- 1 Lutw. 251.

venant on the plaintiff's part is in the negative, which may be broken at any time during his life. For every man's bargain is to be taken as he intended, when he gives credit, and relies upon his remedy, it is reaſonable that he ſhould be left to it: But a man ſhall not be compelled to truſt when he never intended it.

Sect. 2. He therefore, who demands the execution of an agreement, ought to ſhow, that there has been no default in him in performing all that was
* P. 43. to be done on his part; * for, if either he will not, or thro' his own negligence cannot perform the whole on his ſide, he has no title in Equity to the performance of the other party, ſince ſuch performance could not be mutual. And upon this reaſoning it is, that where a man has trifled, or ſhewn a backwardneſs in performing his part of the contract; Equity will not decree a ſpecifick performance in his favour, eſpecially if circumſtances are alter-
2 Ch. Ca. 5. ed. So if a man buys land, or certain ſhares of a ſhip, and ſecures the money, (*viz.* by giving bond, *&c.*) if the ſeller will not make an aſſurance when reaſonably demanded, he ſhall loſe the bargain; for the party ought not to be perpetually bound without having a performance. But if a third perſon ſhould take a conveyance with notice, and without tender and refuſal, he would be liable. So where there was an agreement between lord and tenant for incloſing a common, that the tenants ſhould quit their rights of common, and the lord ſhould releaſe them all of quit-rents, the incloſure was prevented by pulling down the fences, and the tenants continue to uſe the common; this is a waver of the agreement.

Sect. 3. But if a man has performed a valuable part of the agreement, and is in no default for not performing the reſidue, there it ſeems but reaſonable, that he ſhould have a ſpecifick execution of the other

other part of the contract, or at leaſt that the other ſide ſhould give back what he has received, or uſe his beſt endeavours, that he be not a loſer by him. For ſince he entered upon the performance in contemplation of the equivalent he was to have from the perſon with whom he contracted; there is no reaſon why this accidental loſs ſhould fall upon him more than upon the other.

Sect. 4. And ſome ſay, that in all caſes that lie in compenſation, Equity will relieve; for where they can make compenſation no harm is done. So that altho' an expreſs time be appointed for the performance of a condition, the Judge may, after that day is paſt, allow a reaſonable ſpace to the party, making reparation for the damage, if the damage be not very great, nor the ſubſtance of the covenant deſtroyed by it. As where the condition is for the payment of money at a certain time; for they may allow intereſt for it from the day it ſhould have been paid, and the forfeiture is a penalty which is a ſubject matter of relief. But where it is for the doing a collateral act, they cannot know of what value it is to the party. And at Law, that which is granted or reſerved * under a certain form, is never drawn to a valuation or compenſation; and he ſhall make his own grant void, rather than the certain form of it ſhould be wreſted to an equivalent. For the law allows every man to part with his own intereſt, and to qualify his own grant, as he pleaſes; and therefore will not ſuffer any ſatisfaction, or recompence to be given in lieu of it, if the thing be not taken as it is granted. So in Equity, if a creditor agrees to take a ſum of money leſs than his debt, if paid at ſuch a day, he cannot be relieved, if the money is not paid. So where *A.* ſeized in fee, and having three daughters, deviſes to truſtees to convey to the eldeſt, if ſhe ſhall pay 6000*l.* to her two ſiſters in ſix months; and if not,

1 Vern. 79, 167. Salk. 156.

* P. 44.

1 Vern. 210. 1 Ch. Ca. 110

1 Vern. 223 Cont.

then gives the like pre-emption to the ſecond, and then to the third: The money muſt be paid punctually to the time, and Chancery will not enlarge it.

Dyer. 2 Vern. 337. *Sect.* 5. And we muſt agree, that mens deeds and wills, by which they ſettle their eſtates, are the Laws that private men are allowed to make, and they are not to be altered even by the king in his 2 Vern. 339. Courts of Law, or conſcience. So that altho', in caſe of conditions ſubſequent, that are to defeat an eſtate, they are not favoured in law, and if the condition becomes impoſſible by the act of God, the eſtate ſhall not be defeated or forfeited, and a Court of Equity may relieve to prevent the deveſting an eſtate; yet it cannot relieve to give an eſtate that never veſted. And if the party himſelf, who was maſter of the eſtate, and might have diſpoſed of it as he pleaſed, is to be tied down to the terms and circumſtances he had impoſed upon himſelf, and thoſe that claim or derive under him: Thoſe to whom he gives an eſtate upon terms and conditions muſt ſtand much more obliged to the performance of the conditions and circumſtances upon which it is given and if the condition becomes impoſſible, even by the act of God, the eſtate will never ariſe. But conditions to reſtrain marriages annexed to legacies ſtand upon other reaſons; becauſe legacies being recoverable properly in the Eccleſiaſtical Court, where the Civil Law obtains, are here to be interpreted by the ſame Law, that there may be a conformity in the Laws that govern them: And by the Civil Law, theſe reſtraints are odious and not binding, unleſs there be an expreſs deviſe over, more than the law implies.

Sect. 6. As to the manner in which the agreement is to be carried into execution, it is to be obſerved, that there are ſome rules peculiar to certain kinds * P. 45. of agreements relievable only * in this Court. Others belong more properly to the Municipal Law.

Law. As for the firſt, contracts are divided into gainful or chargeable. Gainful contracts bring ſome advantage to one party *gratis*, and therefore in theſe, the magiſtrate is obliged to proceed according to the ſtated forms and rigour of Law; for elſe a man's generoſity might prove too great a burthen to him, if he ſhould be bound to do more than he has expreſsly declared. But chargeable contracts bind both ſides to an equal ſhare of the burthen, for here we act, or give, in order to receive an equivalent. So that they may well admit of Equity in the interpretation: ſince the obligation being mutual, neither party ought to be over-burthened. And the Court of Chancery makes the ſame difference between voluntary and mutual agreements. And therefore the intent of marriage-articles appearing to be a reciprocal contract between them for ſettling each other's claim ought not to be extended larger on one ſide than the other. But Equity will not carry a covenant, being a free gift, beyond the letter. 2 Vern. 693.

Sect. 7. So altho' limitations of eſtates, whether it were by way of truſt, or by eſtate executed at the common law, are to be governed by the ſame rule, and the Court muſt take the words as they find them: Yet where ſettlements are agreed upon valuable conſideration, this Court will aid in artificial words, and make an artificial ſettlement. As in the common caſe of marriage-articles, where they are ſo penn'd, as that if a ſettlement were made in the preciſe words of them, the huſband would be tenant in tail: Yet this Court will order it to be ſettled on the huſband for life only, and then upon the firſt and other ſons. For articles are only minutes or heads of the agreement of the parties, and therefore ought to be ſo modelled when they come to be carried into execution, as to make them effectual according to the intent. And

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if they come into a Court of Equity for a ſpecifick execution, the Court will provide, not only for the ſons of that marriage, by proper limitations, but likewiſe for the daughters. And even altho' a ſettlement were actually made in purſuance of ſuch articles before marriage, Equity will rectify it, in favour of the iſſue female.

Sect. 8. But Equity will not interpoſe in caſe of a bare volunteer. And therefore in a deviſe, if the eſtate is executed, the law muſt take place: But if executory only, the intent and meaning is to be purſued. As if *A.* deviſes lands to truſtees to pay debts and legacies, and then to ſettle the * remainder on her ſon *B.* and the heirs of his body, with remainder over, and directs, that ſpecial care ſhould be taken in the ſettlement, that it ſhould never be in the power of her ſon to dock the intail; the ſon ſhall be only tenant for life, but without impeachment of waſte. And it is as ſtrong in the caſe of an executory deviſe for the benefit of the iſſue; as if the like proviſion had been contained in marriage-articles. But had ſhe by her will deviſed to her ſons an eſtate-tail, the Law muſt have taken place, and they have barred their iſſue, notwithſtanding any ſubſequent clauſe or declaration in the will, that they ſhould not have power to dock the intail; for a deviſe differs from marriage-articles in this reſpect, that the iſſue under marriage-articles claim as purchaſers, but under a will they are only volunteers.

2 Vern 526.

* P. 46.

Sect. 9. And as this Court is to enforce the execution of agreements, and regards the ſubſtance only and not forms and circumſtances, it therefore looks upon things agreed to be done as actually performed, as money covenanted to be laid out in land to be in fact a real eſtate, which ſhall deſcend to the heir. So where money is agreed on marriage to be laid out in land, and ſettled to the uſe of the

1 Vern. 298, 471.

the huſband and wife for their lives, remainder to their firſt and other ſons in tail, remainder to the daughters in tail, remainder to the right heirs of the huſband, provided, that if the huſband died without iſſue, the wife might make her election, whether ſhe would have the land or money; this money is bound by the articles, and ſhall not be aſſets to ſatisfy creditors, but the heir ſhall have it, as the land ſhould have gone in caſe the money had been laid out according to the articles; and here the huſband having iſſue at his death, tho' it died ſoon after, he could not be ſaid to die without iſſue, ſo no election could ariſe to the wife.

Sect. 10. But ſome ſay, that altho' money ſhall in many caſes be conſidered as land, when bound by articles, in order to a purchaſe: Yet whilſt it remains ſtill money, and no purchaſe made, the ſame ſhall be deemed as part of the perſonal eſtate of ſuch perſon who might have alien'd the land, in caſe a purchaſe had been made. As if the limitation were to be of the lands, when purchaſed, to the huſband for life, remainder to his intended wife for life, remainder to firſt and other ſons in tail, remainder to daughters, remainder to the right heirs of the huſband; this money tho' once bound by the articles, yet when the wife died without * iſſue, became free again, and was under the power and diſpoſal of the huſband, as the land would likewiſe have been in caſe a purchaſe had been made purſuant to the articles, and therefore would have been aſſets to a creditor, and muſt have gone to the executor or adminiſtrator of the huſband; and the caſe is much ſtronger, where there is a reſiduary legatee. Yet there can be no fine levied of money in truſtees hands to be laid out in lands.

2 Vern. 296. Sed. vide Forr. 90. 3 W. 221.

* P. 47.

Sect. 11. But *2dly*, We are to treat of ſuch rules as belong more immediately to the Municipal Law: Since where there is no particular motive for

for Equity to interpoſe, the Court of Chancery follows the Law. And here we may obſerve in general, that interpretation is a collection of the meaning out of ſigns moſt probable: And theſe are words, and other conjectures. As for words; the rules are well expreſſed in the ancient form of making leagues, which appointed, that the words ſhould be expounded fairly, in the common ſenſe that the words bore in that place at that time. And the difference is apparent between writs and deeds, or wills. For in adverſary writs, nothing ſhall be demanded or recovered, but according to its proper ſignification: And therefore a reputed name will not ſerve. But in deeds or wills they ſhall be taken according to the common intendment and phraſe of the country; and ſo in a verdict, or an amicable writ: as a fine or recovery. But as to names, either of the perſon or thing, in deeds and wills, or amicable writs, the general rules are theſe, 1ſt, *Quod de nomine proprie non eſt curandum dum in ſubſtantia non erretur*, and therefore a reputed or known name is ſufficient, and this need not be time out of mind, as in preſcriptions, but ſuch convenient time as they may be known by ſuch name *in Vicineto* where it is to be tried. 2*dly*, *Quod nihil facit Error nominis cum de corpore conſtet*, and therefore where the thing paſſes by livery, *præſentia corporis tollit errorem nominis.* 3*dly*, If there be two of the ſame name, there the intent ſhall be taken. 4*thly*, In caſe of a corporation or common perſon, a deſcription, which is *vice nominis*, is ſufficient, if the perſon be ſo deſcribed, as he may be certainly diſtinguiſhed from other perſons. As heirs of the body of *J. S.* now living, is tantamount to heir apparent. So, where he takes notice in the will, that others were his heirs general: A limitation to his brother's ſon by the name of heir male, is a good name of purchaſe. But as all deviſes to diſinherit

diſinherit an heir at Law are to be taken ſtrictly, and *the words heirs males being a legal term, where they are not accompanied with any other words to determine the ſenſe otherwiſe, as heir apparent, or heir now living, *&c.* they cannot amount to a ſufficient deſcription of the perſon, if there be another who is heir general. But a remainder to the heirs male of the body of *E. L.* is good, tho' *E. L.* is living at the time when the remainder happened to take place, and the heir apparent ſhall take. * P. 48.

Sect. 12. And not only the place, but the time is material; for the contract takes effect immediately, and therefore is to be interpreted as matters ſtood at that time. As in a loan, the value is to be eſtimated, as it was at the time of the contract. So in a will, the value of a legacy of ſugars, payable ſuch a year, after the time is elapſed, becomes a perſonal duty to be paid in money here, of a mean value of the ſugars there in that year. So if a ſettlement for a jointure is made in purſuance of articles, and there is a covenant in the articles, that the lands are of ſuch a yearly value, but it is omitted in the ſettlement: Yet the covenant ſhall be decreed *in Specie*, but the value of the lands are to be eſtimated, as they were at the time of the jointure ſettled, and not according to the preſent value, rents being now much fallen every where, unleſs the covenant had been, that they ſhould continue ſo. But every man is to ſuffer for his own delay or neglect. And therefore he who does not perform his part of the contract, at the time agreed on by the parties, or appointed by Law, muſt ſtand to all the conſequences. As if *A.* is bound to transfer ſtock before the 30th of *September* to *B.* and the time is paſt, and the ſtock much riſen; he ſhall ſtill be obliged to transfer ſo much ſtock *in Specie*, at the price it is now at, and account for all dividends from the time that it ought to have been transferred. 1 Vern. 218. 1 Vern. 394.

Sect. 13. It is certain therefore, that when words may be ſatisfied, they ſhall not be reſtrained further than they are generally uſed, but they are to be underſtood in their proper and moſt known ſignification. But all the clauſes of covenants are to be interpreted one by another, in giving to each of them the ſenſe which reſults from the whole; for it is one entire deed which ought to agree with itſelf, and all the words take effect by one livery, and all tend to one end and purpoſe. And all deeds are but in the nature of contracts, and the intention of the parties reduced into writing; and the intention is chiefly to be regarded. In an act of parliament, the * intent appearing in the preamble ſhall control the letter of the Law; (for the preamble is as a key to open the meaning of the act, tho' in reality they are no part of the act, and introduced but of late years;) and in caſe of a deed made in purſuance of articles, the articles ſhew the intent of the parties as much as a preamble can that of an act of parliament.

2 Vern. 58.

* P. 49.

Sect. 14. And it is a general rule, that ſeveral deeds made at one time, are to be taken as one aſſurance; yet every one hath its diſtinct operation to carry on the main deſign. And therefore where a man covenanted by marriage-articles to pay the legacies charged upon his wife's eſtate, and gave a ſtatute, and alſo a mortgage of his own eſtate, to ſecure the ſame, and by an indorſement upon the mortgage the ſame was to be void, unleſs the wife's eſtate was ſettled upon him for life, *&c.* according to the marriage-articles: This indorſement, tho' upon the mortgage only, is ſufficient to diſcharge the ſtatute and articles. Beſides they being all executed at one and the ſame time, the ſame witneſſes, and part of the ſame agreement, are all to be looked

looked upon as but one conveyance. So where a father put his ſon apprentice, and gave a bond for his fidelity, and at the ſame time took a covenant from his maſter, that he ſhould at leaſt once a month ſee his apprentice make up his caſh; this bond and covenant ought to be taken as one agreement, and therefore the father ſhall be anſwerable for no more than the maſter could prove the apprentice imbezzeled in the firſt month when the imbezzlement began. 2 Vern. 518.

Sect. 15. But that which helps us moſt in the finding out the true meaning, is the reaſon or cauſe which moved the Will. And this is of the greateſt force, when it evidently appears, that ſome one reaſon was the only motive that the parties went upon; which is no leſs frequent in laws than in pacts. And here that common ſaying takes place, *That the Reaſon ceaſing, the Law itſelf ceaſes.* So a preſent made in proſpect of marriage may be revoked, and demanded back, if the marriage does not take effect, eſpecially, if it ſticks on that ſide to whom the preſent was made. And with this agrees the practice of the Court of Chancery, where if a term be raiſed for a particular purpoſe in purſuance of marriage-articles, when that purpoſe is anſwered, it ſhall fall again into the inheritance, and ſhall not be aſſets to pay any debts, but what * affect the inheritance; as bond debts, and debts of a ſuperior nature, and not ſimple contracts. Prec. Ch. 245. * P. 50.

Sect. 16. And the matter which he is about, is always ſuppoſed to be in the mind of the ſpeaker: Altho' his words ſeem to be of a larger extent. As general words in a releaſe of all demands, or the like, ſhall be reſtrained by the particular occaſion, and ſhall be intended only of all demands concerning the thing releaſed. So the Limitation of the truſt of a term, which was the huſband's, upon his marriage with *A.* to himſelf for life, remainder 2 Vern. 114.

mainder as to a moiety to *A.* for life, for her jointure, remainder to the heirs of the body of *A.* by him begotten, remainder as to the other moiety to the children of the body of *A.* muſt be intended the children of that marriage, and not as a proviſion for any child of her's by any other huſband.

1 Ch. ca. 191. So the condition of a recognizance ſhall be qualified in Equity, according to the intent and Equity of the caſe for which it was given.

2 Vern. 58. *Sect.* 17. And from the regard that the Law itſelf gives to the intention of the parties, it is that where there is a fine by way of render, there ſhall be no dower, and ſo a rent or recognizance ſhall not be extinguiſhed, by levying a fine to the party. And altho' a fine and non-claim is a good bar to an Equity of redemption, or to a bill of review; yet it would be otherwiſe where levied upon the making of the mortgage only to ſtrengthen the ſecurity. But there are ſome caſes where Equity will carry the conveyance further than he intended it upon apparent Equity: As if a tenant in tail confeſs a judgment, *&c.* and ſuffer a recovery to any collateral purpoſe, that recovery ſhall enure to make good all his precedent acts and incumbrances.

Sect. 18. And where words, if taken literally, are likely to bear none, or at leaſt an abſurd ſignification, to avoid ſuch an inconvenience, we may deviate from the received ſenſe of them; for the agreement of the parties is the only thing which the Law regards in Contracts. And it is a known rule, that a man's act ſhall not be void, if it may be good to any intent: For every deed is made for ſome purpoſe. So that for the neceſſity, *ne res pereat*, where there is no other way of ſatisfying the will and intent, the words may be taken in the moſt extenſive and improper ſenſe. As a rent or reverſion of tithes, will paſs by a deviſe of all his lands.

1 Ch. ca. 240 So a Truſt to raiſe out of the profits implies a ſale, eſpecially

eſpecially * if it cannot be raiſed conveniently within the time limited. Otherwiſe if it be of the annual profits. * P. 51.

Sect. 19. *Laſtly*, There is a difference between teſtaments and deeds. For in teſtaments it is only one perſon who ſpeaks, and his will ought to ſerve as a Law, of which every part ſhall ſtand together, if it may; and therefore if a man in the firſt part of his will deviſe his land to *J. S.* and in the latter part to *J. N.* they ſhall have a joint eſtate: Or if in the latter part, he had deviſed a rent of it to *J. N.* this ſhould have been conſtrued firſt a deviſe of the rent to *J. N.* and afterwards of the land to *J. S.* charged with the rent. For a Will is for the benefit of the teſtator, and at moſt implies only a conſideration of love and affection, and therefore ſhall not be taken ſtrongeſt againſt the teſtator, or moſt beneficial for the deviſee, but equally. But a Deed imports a valuable conſideration, and is for the advantage of the grantee alone: And therefore if there be any doubt in the ſenſe, the words are to be taken moſt forcibly againſt the grantor, that he may not by the obſcure wording find means to evade it. And the grantor cannot by any act of his derogate from his grant, or contradict in the latter part what he has paſſed by the premiſſes, for his act ſhall be conſtrued moſt forcibly againſt himſelf. And the latter part may qualify and explain the premiſſes, or enlarge them; for no word ſhall be rejected that may properly ſtand; but not abridge, or contradict, or controul them; for this would be repugnant. But this is meant only of divided clauſes: For of one clauſe carried on with a connection till the whole is finiſhed, the Law is otherwiſe. And indeed in one ſentence it is in vain to imagine one part before another, ſince the mind of the author comprehends them at once. 2 Vern. 30.

Sect.

Sect. 20. And ſo much for the diſcovery of the meaning where the conſent is declared by expreſs ſigns. Yet ſometimes it is ſufficiently gathered from the nature and circumſtances of the buſineſs itſelf. What we moſt commonly meet with of this kind is, that when ſome principal and leading contract has been entered upon by expreſs agreement, ſome other tacit pact is included in it, or flows from it, as we cannot but apprehend upon conſidering the nature of the affair. It is upon this the principal of Law is founded, that whenever the Law, or the party, giveth any thing, it giveth implicitly whatever is neceſſary for the taking and enjoying of the ſame. But things appendant, appurtenant, or regardant, do * not paſs without the words *cum pertinentiis*; becauſe they are not expreſſed nor implied by Law in the Grant. And there is no ſort of covenant in which it is not underſtood, that the one party is bound to deal honeſtly and fairly by the other, and to do whatever Equity may demand. As if the price be omitted, it is to be eſtimated at the common rates. So the time of payment or delivery being added only in favour of him who is oblig'd, he is bound to do it, or pay, immediately, if it requires a neceſſary delay. So if the place be omitted, it ſhall be delivered at the place, where it happens to be at the time. In the ſame manner moſt covenants leave ſome ſlight exceptions and conditions to be underſtood. But in all theſe it is ſtrictly required, that not ſo much as one probable conjecture appear to the contrary, *Tale oportet ſit quod pro naturâ actus credi debeat exceptum.* For otherwiſe it would be eaſy to thruſt a troubleſome obligation upon a man againſt his will. And were too great a licence given to theſe ſecret and implied reſerves, there is ſcarce any covenant which might not be either annulled or evaded by them.

* P. 52.

BOOK

BOOK II.

CAP. I.

Of Uſes and Truſts.

THEIR NATURE.

Sect. 1. WE will now proceed to ſome of the particular kinds of agreements, which occur moſt uſually in Chancery. And 1*ſt*, Of a *Depoſitum* or truſt, to which this Court owes its original, and which, if well conſidered, will ſtill be found to make the principal buſineſs here. For whoever has the poſſeſſion of goods or lands, either hath the abſolute property or eſtate in them, by a ſufficient title; or, ſo far as this is wanting, is conſidered as a truſtee for the true owner. And no man can be deprived of his eſtate and property, but with his conſent, or by order of Law; as by ſome contract or conveyance, or by a forfeiture for ſome crime, or want of claim in due time, or for ſome other default or negligence in him. And therefore if a man pays money upon a miſtake, it not being intended as a gift, the receiver ſhall take it only in truſt for him that paid it. And he may recover it back again even at Law. But if the payment were upon an illegal contract, the Law will not * encourage ſuch engagements ſo far, as to help him again to his money; tho' if it were unlawful only

* P. 53.

only on the part of the receiver, it might be otherwiſe. And the ſame rules may be applied to all other engagements.

1 Inſt. 272 b. 1 Co. 121. *Sect.* 2. Now an uſe is a truſt, or confidence, which is not iſſuing out of the land, but as a thing collateral, annexed in privity to the eſtate, and to the perſon concerning the land, *viz.* that *Ceſtuy que Uſe* ſhould take the profits, and that the terre-tenant ſhould make eſtates according to his direction, and plead ſuch pleas as he ſhould ſupply him with at the coſts and expences of the *Ceſtuy que Uſe*. So that the *Ceſtuy que Uſe* had neither *Jus in re* nor *ad rem*, *i. e.* neither a right in poſſeſſion, nor in action; but only a confidence and truſt which the Common Law, tho' it took notice of, would not protect, nor give him any remedy for it; but his remedy was only by *Subpœna* in Chancery. And if the feoffees would not perform the order of Chancery, then their perſons were to be impriſoned for the breach of the confidence, till they did perform it. For Chancery will not ſuffer a right in conſcience to be without a remedy; and the firſt feoffment ſhall not come in examination, but only whether in conſcience the intent ought not to be performed.

Sect. 3. But theſe uſes proving a great grievance to the kingdom, and therefore eſteemed odious in the Law, they being founded uſually in fraud, to evade the ſtatutes of mortmain, or to prevent forfeitures, or the wardſhip of the heir, or juſt debts, and the like; for they were accounted in Law neither chattel, nor hereditament, and were no aſſets to the executor or heir, neither could they be forfeited; the ſtatute of 27 *H.* 8. *cap.* 10. to prevent theſe inconveniences, hath ſince executed the poſſeſſion to the uſe, ſo that ſuch uſes have now the ſame qualities, as eſtates at Common Law, and a rent may be reſerved out of them. And there ſhall be a tenancy by the curteſy of ſuch an eſtate veſted,

2 Vern. 585, 681.

veſted, and it ſhall be affets; for the uſe and poſſeſſion paſs by virtue of the ſtatute both together in one inſtant, *tanquam uno flatu*. And a bargain and ſale of an eſtate for years is capable of releaſe by this ſtatute, and ſo is the conſtant practice: Which method of conveyance, was firſt deviſed by Sir *Francis Moor*. Yet actual poſſeſſion is not in the *Ceſtuy que Uſe* by this ſtatute; neither upon ſuch a ſeiſin can he maintain an ejectment, for it is impoſſible an act of parliament ſhould give any more than a civil ſeiſin. And Mr. *Noy* was of * opinion, * P. 54. that this conveyance by leaſe and releaſe could never be maintained, without the actual entry of the leſſee, as the ancient courſe was: And in the caſe of a Common Law leaſe, this may perhaps be true, for the eſtates are not divided till then, and ſo no privity.

Sect. 4. Yet, notwithſtanding this ſtatute, there Eq. Ab. 381, are three ways of creating an uſe or a truſt, which 393. ſtill remains a creature of the Court of Equity, and ſubject only to their control and direction. *1ſt*, Where a man ſeized in fee, raiſes a term for years, and limits it in truſt for *A. &c.* for this the ſtatute cannot execute, the termor not being ſeized. And the Law is the ſame of annuities, and perſonal chattels; for the ſtatute intended to remit the Common Law, and chattels might ever paſs by teſtament or parol only. And the word (perſon) excludes all dead uſes, which are not to bodies living and natural. *2dly*, Where lands are limited to the uſe of *A.* in truſt to permit *B.* to receive the rents and profits; for the ſtatute can only execute the firſt uſe. And the Common Law rejected the ſecond uſe as void, but Chancery conſidered the intent of the conveyance. *3dly*, Where lands are 1 Vern. 414. limited to truſtees to receive, and pay over the rents and profits to ſuch and ſuch perſons: For here the lands muſt remain in them to anſwer theſe purpoſes.

Otherwiſe they would be the truſtees, contrary to the expreſs words of the will or other conveyance.

Sect. 5. And the ſtatute did no more, in executing the poſſeſſion to the uſe in the ſame plight as he had the uſe, than Equity would have done before. So that uſes are raiſed by the ſame conveyances and agreements, as before the ſtatute And as at Common Law, they being a creature of Equity, that is, only an equitable right or conſcience, and no poſſeſſion, are guided entirely by the rules of Equity, and not ſubject to the rules of Common Law, tho' in a deed. For the operation of the ſtatute is, by bringing the poſſeſſion to the uſe, and not the uſe to the poſſeſſion. So that altho' after they are executed by the ſtatute, uſes ſeem not to differ from the poſſeſſion: Yet before they are governed by Equity, and the not regarding this, but ſtriving to conſtrue them by the ſtrict rules of Common Law, was the cauſe of many erroneous opinions, both before and after the ſtatute.

CAP. II.

* P. 55. * *Of the Creation of Uſes.*

Sect. 1. NOW an Uſe at Common Law might be created two ways. 1*ſt*, by the intent
1 Inſt. 271 b. of the parties upon tranſmutation of the poſſeſſion. Or 2*dly*, By an agreement made upon an effectual conſideration, without tranſmutation of poſſeſſion. The intent, upon tranſmutation of the poſſeſſion, might be declared by writing, or by parol. For the uſe was there according to the intent, and no matter how that intent was manifeſted. Since an uſe but a truſt, which is not like land, for land cannot paſs without livery; but an uſe one may give

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or deviſe at his pleaſure by nude parol, for a deviſe is as a gift. And ſo the practice was before the ſtatute of wills, to put their lands in uſe, that they might paſs without livery. And the limitation of the uſes was to be by him who had the eſtate in the land according to his intent. For if no intent was expreſſed, nor conſideration effectual implied, the uſe aroſe to the ſame perſon who gave the eſtate, according to ſuch intereſt as he conveyed. And the uſe enſued the ownerſhip of the land, without having regard to eſtoppells, which are adverſe to truth and Equity. For the conveyance ſtanding indifferent, the Chancery thought it beſt to put the proof upon him, who took the poſſeſſion; and if he failed, would have compell'd a re-conveyance. But where there was an expreſs conſideration, an uſe limited contrary to it was void. As if upon a ſale or leaſe with rent reſerved, the uſe were limited to the vendor or leſſor. Otherwiſe of a conſideration implied: As in a deviſe to an uſe, the uſe may be excuted, if the intent of the deviſor appear to be ſo. Yet a deviſe imports a conſideration in itſelf, and therefore cannot be averred to be to the uſe of another than of the deviſee, or for a jointure, unleſs it be expreſſed in the will.

Sect. 2. An agreement to raiſe an Equity to have the land ought to have an effectual conſideration; as money, pains, and travel, marriage, or natural affection. For an uſe will not ariſe either by deed, or deed inrolled, without an actual conſideration: Altho' a deed, for the ſolemnity, imports a conſideration in Law. And there are two ſorts of good conſideration; a conſideration of nature and blood, and a valuable conſideration. But there is this difference between them, that money * may be given by one, in conſideration of all the eſtates; for it being given for them, they are made parties to the conſideration: But natural affection will not raiſe an uſe to a ſtranger to the conſideration. And this

* P. 56.

1 Co. 176.
4 Co. 13.
11 Co. 55, 56

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is the reason, that a general power in such case to limit uses to any body is void. So that a limitation afterwards, tho' to his daughter, is not good: For a good execution will not profit, where the constitution is defective. And in a covenant to stand seized, where the consideration is general, and the person incertain, no averment can be taken: But when the person is certain, such an averment may be taken as stands with the deed. And so where the consideration is particular and certain, as of brotherly love or advancement of his blood; there the person by matter *ex post facto*, may be made certain. And altho' there be a consideration expressed, yet any other may be taken, as stands with it, and is not repugnant. But it matters not whether the consideration be past, present or future: Only a consideration executory will not raise an use, till it be executed. Neither in a valuable consideration is the *Quantum* regarded in Law. Nor any averment allowed to the heirs, that the consideration expressed was false, or not paid; for he is estopped by the deed. And upon these considerations, if any agreement be made by the owner of the land, this agreement makes a sufficient Equity, for those to have the land to whom it is appointed by the agreement. For if an Equivalent be given, tho' the contract be not executed with all the formalities of Law: Yet in Equity the use of the lands ought to be in the purchaser. And so if a man parts with any lands in advancement of his issue, and to provide for the contingencies, and necessary settlements of his family, it is fit the Chancery should make such conveyance good, tho' they want the ceremonies of Law, so as they may best comply with the peace of families; for their establishment is part of the nature and end of government. But if I bargain and sell land to my son, no use ariseth unless there be a consideration of money; for selling

ing, *ex vi termini*, ſuppoſes my transferring a right of ſomething for money the common medium of commerce. And if their be no ſuch conſideration, it may be an exchange, a covenant to ſtand ſeized, a grant, *&c.* but it can be no ſale.

Sect. 3. And it was much controverted at firſt, whether a deed were neceſſary to the raiſing of an uſe? In a bargain * and ſale, it was agreed on all ſides, not to have been required at Common Law; by reaſon of the conſideration given for the land; and that was the cauſe why the fee-ſimple would paſs there, without the word heirs. And it was ſaid that a man's blood, and the building up a family, is of more value to him than his money. And where throughout the whole body of the Law ſhall it be ſeen, that to any thing which may paſs by contract, there needs any other thing than the words, which make the contract, as writing, or the like, teſtifying it? And that the law was ſo, appears by the ſtatute of 27 *H.* 8. which was made to alter it as to the freehold in bargains and ſales; but by an exception at the end of the ſtatute, *London* is as it was at Common Law. And uſes in ſuch caſes, in reſpect of marriage, which is always a thing public and notorious, were for the ſolemnity left at Common Law. And not reſtrained, as the bargain and ſale, which by common preſumption may be made more ſecretly and eaſily. Yet notwithſtanding theſe reaſons, this point hath been ſince clearly determined otherwiſe; for the miſchief that would follow, if an uſe ſhould ariſe without a ſettled reſolution, manifeſted by a deed.

* P. 57.

Sect. 4. And now by ſtat. 29 *Car.* 2. altho' a leaſe for three years, *&c.* may be made by parol: Yet when it is made in writing, the truſt of that leaſe cannot be declared by parol. But a confeſſion of a truſt in an anſwer for the wife and children, tho' no proof of it, will be good in Equity. So it

2 Vern. 288.

1 Vern. 296

if the ſon prevails upon the mother, to get the father to make a new will, and make him executor in her ſtead, promiſing himſelf to be a truſtee for the mother; this will be decreed a truſt for the wife, on the point of fraud, notwithſtanding the ſtatute of frauds and perjuries.

Sect. 5. Alſo the declaration of uſes ought to have a clear and apparent intent, and not to be upon general words, or words ſpoken *in futuro*, (for theſe are executory, and found only in covenant) but ſpoken adviſedly, and *in præſenti*, which is an immediate gift. The words muſt likewiſe be declaratory, and not obligatory; for then they have another effect. *2dly*, The declaration muſt be certain; for elſe there would be no certainty of inheritances. And this certainty ought to be principally in three things, *viz.* in perſons to whom, in lands, *&c.* of which, and in eſtates by which uſes ſhall be tranſfered and declared. And if certainty is wanting in any of theſe, the declaration is not ſufficient.

* P. 58. * *3dly*, The declaration muſt be precedent or preſent and perfect and compleat, and not as a communication in reference to matter to be put into writing after. Yet a deed ſubſequent may declare the uſes of a recovery, *&c.* precedent; becauſe in judgment of Law, it purports againſt the maker and his heirs, *viz.* by eſtoppel, ſince nothing appears to the contrary, that there was a certain and compleat declaration of the uſes of the time of the recovery, *&c.*

Sect. 6. And where the uſes of a recovery are declared by deed precedent, no new or other uſes can be averred by parol; for nothing veſts till the recovery be had, and then the parol declaration ſhall not control the deed precedent, but all parties are eſtopped to aver the contrary. And in caſe of a deed precedent, if the party ſet up other uſes, he muſt confeſs and avoid; for *unumquodq; diſſolvitur eo ligamine quo & ligatum eſt.* *2dly*, But if there be

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two deeds, the laſt ſhall ſtand, and not both; for it would be contrary to the intent of the parties to to make an hotchpot and commixtion of them, which by their creation were diſtinct, and ſeveral, in time, perſons, and eſtates. 3*dly*, This is intended where the fine or recovery is purſuant; for if they vary, there is room and occaſion given to inquire and receive information, that the old agreement was relinquiſhed. And by the ſame reaſon, that the uſe of a fine may be declared by parol upon an original agreement, it may alſo, where the original agreement is relinquiſhed. Yet without ſuch averment the fine ſhall be intended to the uſe of the ſaid agreement, notwithſtanding the variance. 4*thly*, But where they are by deed ſubſequent, new, or other uſes may be averred, without ſhewing the deed, tho' there be no variance: Becauſe there was an intermediate time, when there might be ſuch agreement made. And the uſes ariſe by the recovery according to that agreement, and cannot be diveſted by any declaration by indenture ſubſequent; and if a deed ſubſequent be ſet up, the other may traverſe thoſe uſes.

CAP. III.

Of the Limitation of Uſes by the Party.

Sect. 1. BUT altho' Uſes are no more than an equitable right to the land, and to be determined only in a Court of Equity: Yet Equity often follows the Law, and eſpecially in voluntary conveyances, or where there is no * particular reaſon to favour one ſide rather than the other. There is a known and eſtabliſhed difference therefore between the limitation and creation of Uſes. For in their creation the intent of the parties is chiefly to be regarded: And if the intent is manifeſt, tho' void, yet the conveyance ſhall never take effect any other

* P. 59.

other way. As if Uſes are limited upon the eſtate intended to be transferred, or there be any other circumſtance in the deed that ſhews he deſigned to paſs it at Common Law; becauſe the intent is the great director of Uſes, and no conſtruction can be made againſt the intent apparent. Yet the preciſe technical words of bargain and ſale, or covenant to ſtand ſeized, are not required to raiſe an Uſe: But any words ſufficient to ſhew the intent, or that are tantamount with good conſideration, will do. And the Judges have more regard for the ſubſtance, than the ſhadow and form, and will make a man's intent good in paſſing his eſtate, if by any lawful means it may take effect.

Sect. 2. But as forms and technical words in conveyances are appointed by Law for the general peace and quiet, the words of limitation of eſtates muſt be the ſame by way of uſe, as in a feoffment, and ſo in all common aſſurances, and thus uſes differ from a deviſe. For there, any words which ſhew the intent are ſufficient, if it could be made good by any conveyance in his life-time; becauſe the Law intends the deviſor to be *inops conſilii*, wills being uſually made *in extremis*. So that any words which ſhew the intent, that the deviſee ſhould have the land for ever, will make a fee-ſimple without the word heirs, as *in perpetuum*, or paying where the payment is of a ſum in groſs, and he may not be able to pay it out of the profits. So where he has power to give a fee, he is conſtrued to have one, unleſs he has an expreſs eſtate divided from the power. And in general, wherever lands are deviſed for a ſpecial purpoſe, or for payment of debts, or the like, without any words of limitation; he ſhall have an eſtate to anſwer that purpoſe, by implication of Law. So where *A.* having only a remainder in fee after an eſtate-tail to *B.* deviſes all the houſe called the *Bell Tavern*, to *C.* without ſaying

1 Inſt. 6 b.
1 Bulſt. 222.
Bendloe 11.
Moor 57.
2 Lev. 249.
6 Co. 16.
Cr. Eliz. 378.
Cr. Jac. 527
Cro. Car. 158.
1 Inſt. 9. b.
5 Co. 21.
1 Eq. Ab. 176.
1 Salk. 234.

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ing for what eſtate, the fee paſſes, otherwiſe C. ſhould have nothing. And altho' in a deed, an implication is never admitted, neither ſhall there ever be croſs remainders upon conſtruction of it: Yet in a will it is otherwiſe. But there muſt be an expreſs intent to be collected out of the words, or a neceſſary implication, or elſe the * heir at Law ſhall not be diſinherited; for his title is clear, and not to be doubted of.

Vaugh. 26, 261. 1 Rol. Ab. 843. * P. 60. Cr. Ja. 75. 3 Lev. 260. 2 Sid. 53.

Sect. 3. So if the intent of the teſtator may be collected out his will, that he deſigned an eſtate-tail, tho' the word (body), which properly creates an eſtate-tail, is left out, yet it is an eſtate-tail. As if lands are deviſed to one, and if he dies before iſſue, or not leaving iſſue, or not having a ſon, all theſe limitations create an eſtate-tail. And the meaning of the teſtator is to be ſpelt out by little hints, and no word to be rejected which may poſſibly be made to ſtand. And therefore a deviſe to a man and the heir of his body, tho' in the ſingular number, or to the iſſue of his body, is an eſtate-tail, if he had none at the time that might take jointly with him, according to the rule of Law, the gift being immediate. For heir is *nomen operativum & collectivum*, and chiefly in a will, ſhall be taken in its full extent, and then it reaches the moſt remote heir.

2 Vern. 766. Owen 29. 1 Vent. 231. Bulſt. 219. 1 Vent. 225. 2 Lev. 58. 1 Vent. 230.

Sect. 4. And whenſoever the anceſtor takes an eſtate for life, and after a limitation is made to his right heirs, the right heirs ſhall not be purchaſers. And no difference where the Law creates the eſtate for life, and when the party, or where there is an intervening eſtate, eſpecially if not a freehold. And as anceſtor and heir are cor-relative as to inheritance, ſo are teſtator and executor as to chattels; and therefore a remainder of a term to the executor veſts in the teſtator. Nor will the intention, tho' in expreſs words, control the operation

1 Co. 99.

of Law upon the words expreſſed. As where the anceſtor has an eſtate for life given to him expreſly, a Limitation after to his heirs, or to the heirs male of his body, puts the eſtate of inheritance in himſelf: Otherwiſe perhaps of heir male only in the ſingular number, eſpecially if there be words of Limitation after it. And tho' there be a difference in words, when the land of freehold is deviſed to one for life, the remainder to his heirs, mediately or immediately; and where a term is ſo deviſed, the difference is in words only, for the teſtator's meaning is the ſame. And new Eſtates, Jointures, and Settlements are of long terms, and a ſimilitude is between them, *&c.*

1 Co. 66.

1 Ch. Ca. 308.

2 Ch. Ca. 236.

Sect. 5. There ought alſo to be one univerſal rule of Property in the realm, the ſame in Chancery as at Common Law. And therefore the rules to prevent perpetuities are the policy of the kingdom, and muſt take place in a Court of Equity, as well as in any other Court; and it is an undeniable * reaſon againſt any ſettlement. So that there can be no ſuch thing as a perpetual limitation of a freehold. And if there be a deviſe over to a Charity, in caſe he go about to alien, it will not avail or make the condition good: However, there ought to be a ſtrict ſettlement made, and the intent followed as far as the rules of Law will permit. Nor can a deviſe direct an inheritance to deſcend againſt the rules of Law, as to the heirs male in fee; for what could not be made valid by any act executed in his life-time, cannot be good in a deviſe. And therefore a term limited to a man and his heirs, ſhall go to the executors. So a Will in *Dutch* or *Latin* muſt be ſo framed, as to paſs an eſtate according to the rules of our Law; for a Will or other act of the party cannot rule the Law, but the Law rules them.

3 Ch. ca. 20.

* P. 61.

1 Vern. 161.

2 Vern. 737. Prec. Ch. 455.

1 Inſt. 25 a.

1 Vern. 164.

1 Vern. 85.

Sect. 6. But ſo long as it may be made conſiſtent with the rules of Law; the deviſe ſhall not be impeached.

peached. And therefore, altho' a freehold cannot be granted *in futuro*, by a conveyance in his life-time: Yet where a man in his Will gives a future eſtate to ariſe upon a contingency, and does not part with the fee at preſent, but retains it, this is not againſt Law. For by the Common Law, one might deviſe that his executor ſhould ſell his land, and in ſuch caſe the vendee is in by the Will, and the fee deſcends to the heir in the mean time; and of the ſame nature with theſe are ſpringing Uſes. But as for ſpringing Uſes, like executory deviſes, they are either preſent or future. If preſent; the party muſt be *in eſſe & capax* at the time; for it ſhall take effect according to the intent or not at all. As a feoffment to the right heirs of *B.* is not good as to a ſpringing Uſe; becauſe it is by way of preſent Limitation, *& non eſt Hæres Vivientis*: Otherwiſe if it were future, as to the right heirs of *B.* after his death, *& ſic nota diverſitatem inter verba de præſenti, & verba de futuro.* 2*dly*, If future, they muſt ariſe within a reaſonable time; as a feoffment to the uſe of *A.* after the death of *B.* without iſſue, within twenty or thirty years, or the compaſs of a life or lives, is good, as a ſpringing Uſe, and the whole eſtate remains in the feoffor in the mean time; for let there be ever ſo many, it is but one life, and muſt have an end. But a ſpringing executory Uſe, after a dying without iſſue, the Law will not expect. Nor can it be limited after a fee; for after ſuch a diſpoſal, nothing remains in the owner to limit. But there may be two concurrent contingencies, and not expectant one after the other; as where the * deviſor parts with the whole fee-ſimple but ſome contingency qualifies that diſpoſition, and limits upon another fee, which is altogether new in Law. And the *ultimum quod ſit* of a fee upon a fee in the limitation of an Uſe, is not yet plainly determined. It may be extended further than a life or lives,

1 Salk. 229. 2 Leon. 11. 3 Leon. 64. Cr. Eliz. 833. Moor 644. 2 Roll. Ab. 793. Raym. 82.

1 Salk. 230. 1 Salk. 226.

1 Salk. 229. 1 Salk. 225. 3 Ch. Ca. 9.

1 Salk. 229. * P. 62.

3 Ch. Ca. 36.

as to a year after, and the true rule is to ſtop when it proves inconvenient. Nor is there any danger of a perpetuity from theſe Uſes, as from executory deviſes; for all Uſes as well *in eſſe*, as otherwiſe, may be deſtroyed by the alteration of the eſtate to one againſt whom the remedy fails in Equity, there being no confidence expreſſed or implied. But every executory deviſe is a perpetuity, as far as it goes, that is an eſtate unalienable, tho' all mankind join in a conveyance. And it is to be remembered, that as an executory deviſe is never after a freehold, but it is conſtrued a contingent remainder; becauſe it is admitted only for the neceſſity, and to ſupport the intent, as after a term for years, or the like, upon which a contingent remainder cannot depend by reaſon of the abeyance of the freehold: So there is the ſame difference between a future Uſe and a contingent remainder, by way of Uſe.

2 Saun. 380. 3 Lev. 434. Carth. 310.

CAP. IV.

Of the Limitation of Uſes where the Intent does not Appear.

Sect. 1. BUT further, where the intent of the parties does not ſpecially appear, it is intended to agree with the rules of Law. And therefore the Chancellor, in caſe of an Uſe, often adjudged by Imitation of the rules of Law, and according to the nature and quality of the land; as in caſe *de poſſeſſione fratris*, borough Engliſh, gavelkind, lands on the mother's ſide, *&c.* for Chancery will conſult with the rules of Law, where the intention of the parties does not ſpecially appear. So the widow of the *Ceſtuy que Truſt* of a codow's eſtate, ought to have her free bench or widow's

2 P. Wms. 313

dow's eſtate, as well as if the huſband had the legal eſtate in him: And there it may be ſaid, that *Æquitas ſequitur legem.* So a tenant by the curteſy, ſhall be decreed of a Truſt as well as of a legal eſtate. But dower is not allowed out of a Truſt Eſtate, nor was it anciently of an Uſe, and moſt Eſtates being then in Uſe, was the firſt occaſion and original of Jointures: Tho' no manner of reaſon can be given for it, if it were *Res integra*, but the authorities are clearly ſo, and it would overturn many ſettlements to make an alteration in it.

2 Vern. 585. 3 P.W. 681. 232. 1 Eq. Ab. 217 Perk. 349. 4 Co. 123. 4 Co. Vernon's caſe. Dyer 11. 2 Vern. 585. 1 P.W. 108. 2 P.W. 713. 3 P.W. 234. Forr. 138.

* *Sect.* 2. Upon the ſame kind of reaſoning it is, that a Truſt of a term muſt go as the term at Law would have done by the like Limitations, and if it be given to two jointly, as ſurvivorſhip would have taken place at Law, it muſt do the ſame in Equity: Yet the advantage of ſurvivorſhip is againſt Equity; but the Judges will have it ſo even in a deviſe to executors. And the diſtinction ſeems to be, where two become joint-tenants, or jointly intereſted in a thing by way of gift, or the like, there the ſame ſhall be ſubject to all the conſequence of Law; for in favour of volunteers, there is no reaſon for Equity to interpoſe. But as to a joint undertaking in the way of trade, or the like, it is otherwiſe; and the cuſtom of merchants is extended to all traders to exclude ſurvivorſhip.

* P. 63. 2 Vern. 557. 1 Vern. 14. 1 Vern. 217. 2 Ch. ca. 129

Sect. 3. Yet terms are admitted to attend the inheritance to protect it for purchaſers; and this came up in Queen *Elizabeth*'s reign, ſince the way of limiting terms in mortgage came in uſe. Theſe Truſts of terms attending on the inheritance, tho' entailed, were not within the ſtatute *de donis*, and might be aliened by the parties; but of terms in groſs not, and therefore the Judges would not admit of their being entailed. And a term attendant becomes in groſs, when it fails of a freehold and inheritance to ſupport it, and is divided from the inheritance

3 Ch. ca. 24.

inheritance by different Limitations, or the like:
3 Ch. ca. 48. The Truſts of a term in groſs therefore can be limited no otherwiſe in Equity, than the eſtate of a term in groſs can be limited in Law; for they are not for ſetting up a rule of property in Chancery, other than that which is the rule of property at Law. So that the rules are the ſame in Equity in caſes of Truſts of Terms, as in Deviſes at Common Law.

3 Ch. ca. 32. *Sect.* 4. But a difference between a chattel and inheritance, is a difference only in words, and not in reaſon of the nature of the thing. For the owner of a leaſe has as abſolute a power over his leaſe, as the owner of an inheritance over his eſtate; and where no perpetuity is introduced, nor any inconvenience does appear, there no rule of Law is broken. A term may therefore be limited to twenty ſucceſſively for life, if all in being together,
3 Ch. ca. 33. becauſe they muſt all wear out in a little time. And ſo it is a good Limitation, where the contingency is circumſcribed within the ſpace of twenty-one years, or a compaſs of a life, and one ſtep further, *viz.* to the firſt ſon, tho' not *in eſſe*, at the time. And ſo juſt and reaſonable is this allowance to make
* P. 64. proviſion for * families, that where the common lawyers have complained, that this Court did encroach upon them, it may on the contrary be retorted, that they ought rather to confeſs themſelves beholden to this Court for their rules in Equity.

Prec. Ch. 245, 252. *Sect.* 5. And it is no ſtrange notion at Law, that long terms for years ſhould attend and wait on an inheritance, in which caſe they are to be governed and directed by the intention of the parties, that created them. And when they have done their office, duty, and truſt, and have born the burthen, I mean have raiſed the portions, which was the original cauſe of their creation, then ought they in Equity and Conſcience to ceaſe, and return back

to

to the channel, from whence they were extracted. For it is a reaſon in Law, that *ceſſante cauſa, effectus.* And there is no original conſideration to give them a longer being: So that ſuch a term ought not to be made uſe of to any other purpoſe, eſpecially to deprive a dowereſs of her dower. But theſe terms have been always looked upon as a good ſecurity to a purchaſer againſt dower, tho' the purchaſe was with notice; and frequently to a void charges, they never inſiſt on a fine or recovery.

Sect. 6. But it is ſaid, that if the term be not expreſly declared in the aſſignment to be attendant on the inheritance, but is ſo only by conſtruction in Equity, it ſhall in Equity be aſſets for the payment of debts, but the heir ſhall have the ſurplus. And ſo the difference that had been formerly taken in this caſe between legal and equitable aſſets, has been exploded. Yet the Law ſeems now otherwiſe. For a a term in the owner, is aſſets at Law, but a term in truſt is uot to be made aſſets in Equity, and it would be dangerous to purchaſers to make it ſo. Neither ſhall the cuſtom of *London* prevent the attendance of a leaſe on the inheritance, tho' there was no declaration of truſt, that it ſhould be attendant. So if a feme cover hath ſuch a term, it ſhall not ſurvive to the huſband. Indeed if a man purchaſes an inheritance in the name of truſtees, and takes a mortgaged term carved out of ſuch inheritance in his own name, in order to protect the inheritance, ſuch term will be liabel to the payment of his debts; becauſe it ſtill remains as a chattle in him. But if they are both in the name of other perſons, there is no difference in reaſon, whether he had the term or inheritance firſt in him: But the heirs are to have the leaſe to attend the inheritance.

1 Vern. 188, 189.

1 Vern. 2v

CAP.

CAP. V.

* P. 65. * *Of Uſes Raiſed by Operation of Law.*

Sect. 1. BUT we muſt examine more particularly to whom the Uſe ſhall be by operation of Law, where there is either no declaration, or but in part only, and here it is a general rule, that the Truſt reſults to the party, from whom the conſideration moves. As 1*ſt*, In Caſe of a Purchaſe; where a Man buys Land in another's Name, and pays the money, it will be in Truſt for him that pays the money. So if *A.* agrees for a leaſe for ninety-nine Years, and *B.* advances the money, and the leaſe is taken in the Name of *A.* this is a reſulting Truſt, and out of the Statute of Frauds, *A.* having by letter acknowledged the Truſt. So where one of the three, that held a leaſe under the Dean and Chapter, ſurrenders the old leaſe, and takes a new one to *himſelf*, this ſhall be a Truſt for all. But altho' in the puchaſe-Deed, the conſideration-money is mentioned to be paid by the Purchaſer, and there is no expreſs declaration of a Truſt; yet it appearing upon the face of the Deeds to be a Truſt for an infant-heir in purſuance of Marriage-Articles, and the Purchaſer at the Courts he held, declared it was his Son's Eſtate, it ſhall be decreed a Truſt for him, tho' to the diſappointment of the Purchaſer's Will, and of his Creditors. For tho' Creditors are Favourites, yet we muſt not pay them out of other Mens Eſtates: nor, as Juſtice *Twyſden* ſaid, ſteal Leather to make poor Men's Shoes.

2 Vent. 361. 1 Vern. 366 109. 2 Johns C.C. 405 1 Vern. 276 2 Vern. 167

Sect. 2. And if a Father purchaſe lands, *&c.* in the Name of a Son unadvanced, it is an advancement for him not a Truſt; for the Father is bound by

1 Ch. Ca. 296 2 Vern. 19

by the Law of Nature to provide for his Children, and Chancery will compel him, if they are deſtitute, and not able to maintain themſelves. But if the Truſt is declared before, or at the Time of the Purchaſe; or the Father has already provided for him; or the whole Eſtate is not given him, but Part of it to another; or if he were of full Age, and the Father acts as Proprietor, or does any Thing, which implies him to be Owner of the Land; this ſhall over-rule the Preſumption of Law, in Favour of him. As to the Grandfather, there is a Difference in the Caſe, where the Father is dead, and where he is ſtill living; for when the Father is dead, the Grand-children are in the immediate Care of the Grand-father. And therefore if he takes Bonds in their Names, or makes Leaſes to them, they ſhall not be adjudged * as Truſts, but as a Proviſion for the Grand-child, unleſs it be otherwiſe declared at the ſame Time. But this is to be underſtood only of legitimate Children; for of a baſtard or reputed Child, the Law takes no Notice.

2 Ch. Ca. 231, 232.

2 Ch. Ca. 26.

* P. 66.

Sect. 3. So the Wife cannot be a Truſtee for the Huſband; but if the Huſband purchaſe in her Name, it ſhall be preſumed to be an Advancement, and Proviſion for her. And the Law is the ſame, where the Purchaſe is to himſelf, his Wife and Daughter, and their Heirs; or of Money lent, on Mortgages and Bonds in their Names. Yet in Caſe of Creditors it may be fraudulent as to them, unleſs the Purchaſe is made in purſuance of Articles before the Marriage, or as a ſettlement upon the Wife upon her Marriage. And by the ſame reaſoning it is, that where a Wife is made Executrix, it is to be preſumed, that ſhe is not ſo appointed, to have barely an Office of Trouble, but of Benefit to take the ſurplus, altho' ſhe has a ſpecial Legacy given her; and this is not a Deviſe, but in Nature of an Exception. But otherwiſe of a ſtranger

2 Vern. 67.

So if he buy Lands with her money. 1 Joh. CC 450

Prec. Ch. 231.

2 Vern. 675.

Ab. Eq. Ca. 243.

ſtranger made Executor, who has a particular Legacy; there it implies a Truſt of the ſurplus. Yet the Executor hath the entire Right both in Law and Equity, unleſs by ſome ſuch Circumſtances it appears, that the Teſtator intended the contrary; for it cannot be intended, that a Man makes a Will with an Intent to die Inteſtate; and parol proof ought to be received in Favour of an Executor's Title, conſiſtent with the Will.

1 Eq. Ab. 249.
2 Vern. 648.

Sect. 4. The ſecond ſort of reſulting Uſes are upon Conveyances. For every Man that hath Lands, hath thereby two Things in him; the one the Poſſeſſion of the Land, which in the Law of *England* is called, the Freehold; and the other, the Authority to take the Profits of the Land, which is the Uſe. And therefore, where there is a Feoffment to particular Uſes, the Reſidue of the Uſe ſhall be to the Feoffor; for the Raiſing thoſe particular Eſtates, appears a ſufficient Conſideration for making the Conveyance. And there is no great Difference between a Feoffment to Uſes, and a Covenant to ſtand ſeized; for ſo much as he does not diſpoſe of, remains in him as the ancient Uſe in both Caſes, altho' in the one, there is a Tranſmutation of the Poſſeſſion, and in the other not. So that there ſeems no reſulting Uſe or Occaſion for a Priority in an Inſtant, (*viz.* That it ſhould firſt veſt, and then return.) But there is a Difference, where he who has the Uſe limits it to *A.* for Life, Remainder to the Heirs of the Body of *B.* here no Eſtate can ariſe to *B.* becauſe nothing moved from him: * Otherwiſe if the Limitation is to the Heirs of his own Body, there *ut Res magis valeat*, he ſhall have it for his Life. And altho' an Eſtate cannot ariſe by Implication in a Deed, even by Way of Uſe, and a Man cannot convey to himſelf; yet a Man may qualify an Eſtate that is in him, as in Caſe of a Deviſe, for the Benefit

* P. 67.

of

of the Iſſue in Tail, or him in Remainder. But if a Man covenant to ſtand ſeized to ſuch Uſes, as that he ſhould leave a deſcendible Eſtate in himſelf; as to the Uſe of his ſon from and after his Marriage, or to the Uſe of *J. S.* after forty Years; theſe are not to be reſembled to the Caſes, where the precedent Eſtate cannot continue longer than his Life, and this without any Wrong done to any Rule of Law, may be turned to an Uſe for Life, and therefore ſuch Conſtruction ſhall be.

Sect. 5. And the Words of the Stat. 29 *Car.* 2. *cap.* 3. *and to no other Uſes*, ſhall be conſtrued to no expreſs Uſes; but ſhall not prevent Uſes by Implication, which ariſe of neceſſity, becauſe the Uſes muſt be in ſome Body. But an Uſe reſerved by Implication of Law, ſhall not be implied againſt the expreſs Intent of the Conveyance; for the Statute of Frauds, which ſaves reſulting Truſts, extends only to ſuch as were reſulting Truſts before the Statute, and a bare Declaration by Parol before the Act, would prevent any reſulting Truſt; as if an expreſs Eſtate be limited to the Covenantor. *A Fortiori* where the Eſtates take effect by Tranſmutation of Poſſeſſion, and a particular Eſtate is limited to the Party, as for ninety-nine Years, Remainder to Truſtees for twenty-five Years, Remainder to himſelf in Tail Male, *&c.* this is void, for want of a Freehold to ſupport it. 2 Vern. 294.

CAP. VI.

Of the Extinguiſhment of Uſes.

Sect. 1. WE will now ſee, where the Uſe may be extinguiſhed, or not. For to every Execution of an Uſe by Force of this ſtatute, four 1 Co. 126 a.

Things are requiſite. 1*ſt*, A Perſon ſeized. 2*dly*, A Perſon *Ceſtuy que Uſe*. 3*dly*, An Uſe *in eſſe*, *viz.* in Poſſeſſion, Reverſion, or Remainder. 4*thly*, The Eſtate out of which the Uſe ariſes ought to veſt in *Ceſtuy que Uſe*. And all theſe four muſt concur at one and the ſame Point of Time. So that every Uſe *in eſſe*, *viz.* in Poſſeſſion, Reverſion or Remainder, where the other Circumſtances are not wanting, is executed by the ſtatute immediately: But no future or contingent Uſe, till they come *in eſſe*.

P. 68.* 2*dly*, All Uſes, whether contingent or others, not executed by the ſtatute, remain in the mean Time at Common Law. So that if the Root is defeated, out of which they ought to ſpring, the Uſes are utterly deſtroyed; that is, if the Feoffees and their Heirs do not continue their ſeiſin, or ſome other by their Aſſignment, againſt whom there may be a Remedy in Equity. As where the Party is in, in the *Per*, and with Notice, or without a Conſideration, for then the Law implies Notice. But a Leaſe for Years ſhall only bind the future Uſe, and not deſtroy it for the Freehold; becauſe the ſeiſin re-

1 Co. 137. a. mains. 3*dly*, It was formerly held, that the Feoffees after the ſtatute had a Poſſibility to ſerve the future Uſe, when it came *in eſſe*, and that they ſhould be reputed the Donors of all the contingent Eſtates, when they veſted, and if the Poſſeſſion was diſturbed, the Feoffees ſhould have Power to re-enter to revive the future Uſes according to their Truſt; but if they bar themſelves of their Entry, then this Caſe being not remedied by the ſtatute, remains at Common Law. But this Opinion has been ſince contradicted, and it is now held, that to the Raiſing of the future Uſes after the ſtatute, the Regreſs of the Feoffees is not requiſite, and that they have no power to bar theſe future Uſes; for the ſtatute has taken and transferred all the Eſtate out of them, and they are as meer Inſtruments. So

that

that contingent Uſes do now, like other contingent Remainders, depend upon the particular Eſtate. For to reduce the Eſtates conveyed by way of Uſe to the Common Law, which all ſides agree was the chief End of the ſtatute of Uſes, nothing ought to be left in the Feoffees, no need of any *Scintilla Juris*, or Power of Re-entry for the benefit of the contingent Uſes, nor Power in the Feoffees to deſtroy them, but they are meer Conduit Pipes. And the other Conceit was grounded as it ſeems upon a Zeal againſt Perpetuities and contingent Remainders, there being at that time, no received Opinion, that the Deſtruction of a particular Eſtate would deſtroy a contingent Remainder, till afterwards in *Archer*'s Caſe it was ſo adjudged. 1 Co. 66. b.

Sect. 2. And it ſeems to be the rule of this Court, That where a Man is a Purchaſer without Notice, he ſhall not be annoyed in Equity; not only where he has a prior legal Eſtate, but where he has a better Title or Right to call for the legal Eſtate than the other. But by taking a Conveyance with Notice of the Truſt, he himſelf becomes the Truſtee, and muſt not, get a plank to ſave himſelf, be guilty of a Breach of Truſt, * notwithſtanding any Conſideration paid. Yet where the Truſt is general, as to pay Debts, tho' he has Notice of them, the Purchaſer ſeems not obliged to ſee the money applied: Otherwiſe if the Debts be particular, as for payment of Debts in a ſchedule. So altho' the Law hath intruſted the Executor with the Perſonal Eſtate to pay Debts, and unleſs he has an abſolute power, he has none at all: Yet if a Term is deviſed to Executors to raiſe 2000 *l.* for the Portion of his Daughter, and the Executors mortgage this Term, the Portion ſhall be preferred. 2 Vern. 600. 2 Vern. 271. 1 *Johns.* C. C. 516 * P. 69. 1 Vern. 301. 1 Vern. 303. 1 Eq. Ab. 359. 2 Vern. 444.

Sect. 3. It is Notice of the Uſe therefore, that is all the Effect of the Matter; for then he is *Particeps criminis, & dolus & fraus nemini patrocinantur*, ſince in

in Conſcience he purchaſed my Land, or my Goods. For the Common Law, whenever it found a Conſideration, diſcharged the Covin; but Chancery looks further to the corrupt Conſcience of the party, that will traffick for what in Equity he knows to belong to another. And in all Caſes, where the Purchaſer cannot make out a Title, but by a Deed which leads him to another fact, the Purchaſer ſhall not be a Purchaſer without Notice of that fact, but ſhall be preſumed cognizant thereof; for it was *craſſa negligentia*, that he ſought not after it, and this is in Law a Notice. So where in a Jointure, there was a Covenant againſt Incumbrances, except Leaſes, or Copies determinable on three Lives; the Exception of Leaſes *ut ſupra*, gave Notice of former Leaſes, and therefore he muſt take Notice of the Covenants contained in them. So there was ſufficient Notice in Law, or an implied Notice where the Mortgage was excepted in the Defendant's Conveyance, and therefore they could not be ignorant of the Mortgage, and ought to have ſeen it, and that would have led them to the other Deeds, in which purſued from one to the other, the whole Caſe muſt have been diſcovered to them. And Notice of the Marriage has been conſtrued as Notice of the Jointure, becauſe the wife being under the power of her huſband could not give proper notice, ſo as to prevent the alienation of her intereſt. So if a man purchaſes under a will, by which the truſt is created, he muſt at his peril take notice of the operation and conſtruction of the Law upon it. And tho' this be called a notional notice, yet it is ſuch a notice, as has always been allowed to be good. For every man is preſumed to be conuſant of the Law of the realm, and he ſhall not take advantage of his own ignorance, but *caveat Emptor*.

2 Ch. ca. 246
1 Vern. 149, 319.
2 Vern. 662.
1 Ch. Ca. 291.
2 Vern. 661.

Sect. 4.

*Sect. 4. And notice of the plaintiff's title to the agent or purchaſer for another, as likewiſe notice to the counſel or attorney, that peruſes the Title, is notice to the party himſelf, becauſe a preſumptive notice to the party. So where all the ſecurities were tranſacted by the ſame ſcrivener, notice to him, is notice to them all, and conſequently they that lend laſt, muſt come laſt; for he was in nature of an agent to them all. So where *A.* having notice of an incumbrance, purchaſes in the name of *B.* and then agrees, that *B.* ſhall be the purchaſer, and he does accordingly pay the purchaſe-money without notice of the incumbrance; tho' *B.* did not employ *A.* nor knew any thing of the purchaſe, till after it was made, yet *B.* approving of it afterwards, made *A.* his agent *ab initio*, and therefore ſhall be affected with the notice of *A.* But tho' notice to a man's counſel, is conſtrued as a notice to himſelf; Yet where the counſel comes to have notice of the title in another affair, which it may be he has forgot, when his client comes to adviſe with him in a caſe with other circumſtances; that ſhall not be ſuch a notice as to bind the party.

* P. 76. 2 Vern. 574. 1 Ch. ca. 38.

2 Vern. 609.

*Sect. 5. *Laſtly*, A truſt is revived by a re-purchaſe of the truſtee, altho' a fine paſſed; for it being but a conveyance, it did not extinguiſh or ſeparate the truſt, but transferred both together, and in the gift of the land, he gives all intereſts and demands by reaſon of the land. And ſo where a man wrongfully poſſeſſes himſelf of my goods, and ſells them in a market overt: If he afterwards buys theſe goods again, I may ſeize them in his cuſtody.

2 Ch. Ca. 126.

*Sect. 6. As to the revocation of Uſes, it is a general rule, that things may be avoided and determined by the ſame ceremonies and acts, by which they were raiſed. That which paſſes by livery, ought to be avoided by entry; that which paſſes by grant, by claim; that which paſſes by way of charge, determines

mines in like manner by way of diſcharge. And ſo at Common Law, an Uſe which was raiſed by a declaration or limitation, might ceaſe by words of declaration or limitation. But an Uſe executed by the ſtatute differs not from a legal eſtate, and cannot be waved or determined without entry. Yet for the neceſſity, where the party himſelf is tenant for life, (as in the uſual powers of revocation) by the revocation the eſtate ceaſes without entry or claim; becauſe he cannot enter upon himſelf, and an expreſs act of revocation is as ſtrong as any claim can be. And therefore, that which in a conveyance at Common Law is called a * condition, by way of uſe is called a limitation or a conditional limitation; becauſe it has the effect of a limitation to determine an eſtate of freehold without entry. And by the ſame conveyance, as the ancient uſes are revoked, by the ſame conveyance other uſes may be limited or raiſed; for ſince the ancient uſes ceaſe *ipſo facto* by the revocation without claim, or other act, the Law will adjudge a priority of operation in the deed, tho' it be ſealed and delivered and takes effect altogether. And therefore it ſhall be firſt in conſtruction of Law, a revocation and ceaſing of the ancient uſes, and then a limitation or raiſing of new; for the Law, will marſhal ſeveral acts done at the ſame time, that all may ſtand. But unleſs he reſerves a power expreſly to limit new uſes, he can only revoke.

* P. 71.

1 Inſt. 237. 1 Co. 174.

Sect. 7. Theſe Powers of revocation were only allowable in Conveyances by Way of Uſe; for in a legal Conveyance, ſuch a power would have been repugnant. And they are a Law, which a Man puts upon himſelf by Virtue of the Power which every one has of diſpoſing of his own, as he pleaſes, and therefore they ought to be performed in all the incidental Circumſtances required by the proviſo, *viz.* As to Subſcription, Witneſſes, or the like; for

10 Co. 144.

for these Ceremonies were appointed by him to prevent Fraud and surprize. And there can be no Revocation in Equity, where it is not a good Revocation at Law, unless there be a clear Intention of the party to revoke, which he was prevented carrying into Execution pursuant to the power, by Fraud or Accident. But there is a Difference betwixt a Power reserved to a stranger, and to the owner himself. For a Power to alter or charge the Estate of another, shall be construed strictly, and shall never be extended beyond the Letter and Intention of the parties; because it is to affect the Estate of a third Person. But a Power over a Man's own Estate is Parcel of the old Dominion reserved to him, and for the Benefit of the Party himself, and voluntary, and therefore shall be expounded favourably, many Estates depending upon such Powers. Also a power reserved to himself, who has a present Estate, or shall have by the Ceasing of the Uses, savours of an Interest, and may be extinguished by a Feoffment of the Land, or Release to him that has the Freehold; for he who raises and limits the Use, shall be supposed the Donor; but to a stranger is merely collateral.

2 Vent. 350. Palm. 468. Cr. Eliz. 5: 6 Co. 33. 1 Leon. 35. Cr. Car. 318 2 Ro. Ab. 261. 3 Leon. 130. 4 Leon. 64. Moor. 199. Poph. 9. Yelv. 222. Raym. 257. 1 Co. 112. b.

Sect. 8. In Case of Merger of Terms, the Diversity formerly taken, was this, If a Man has the same Interest, and * absolute Dominion and Property in the whole Inheritance, as he has in the Term, or power for raising Money out of the Inheritance, there it must merge; for a Man cannot have a power to raise money merely for my benefit, out of that which is mine. But if there be any difference in the two interests, or any other person intermediate, then there can be no merger; for if there be any merger in the first case, it will change the intent of the conveyance; and in the other case, there being an intermediate estate, there is no merger at Law, no more is their in a Court of Equity

* P. 72.

1 Eq. Abr. 2 9. 2 Vern. 90. 348. 457.

in the caſe of a truſt. But it has been ſince held, that where the inheritance deſcended to the daughter, as heir, who was alſo entitled to the truſt of the term for her portion, ſo that ſhe had the ſame dominion over both, yet there could be no merger of the term; for that was lodged in truſtees, and ſo not merged at Law, nor conſequently in Equity. For where an infant has two rights in her, this Court, which is to take care of infants, will always preſerve that right, which is moſt beneficial for the infant. And in this caſe, it was for the intereſt and advantage of the infant, that the portion ſhould be looked upon as a continuing and ſubſiſting charge, and not ſink into the inheritance; becauſe it might have been a means to have preferred her in marriage during her infancy, before ſhe was capable of making a ſettlement of her real eſtate, and likewiſe when of the age of ſeventeen, ſhe was capable of diſpoſing by will of her perſonal eſtate, either for payment of debts, or in legacies amongſt her relations.

CAP. VII.

Of the Office and Duty of a Truſtee.

Sect. 1. IT follows, That we treat of the office and duty of the Truſtee, and how far his power extends: And here regularly, no act of the truſtee ſhall prejudice the *Ceſtuy que Truſt*; but the truſtee muſt eſpecially in Equity make good the truſt. And the Law ſeems to be the ſame of the Act of God; for if the truſtee of a legacy dies before the legacy is paid, this ſhall not prejudice the legatee. So if a truſtee of land die without heir, tho' the lord by eſcheat will have the land at Law:

1 Ld. C. C. 27

3 Eq. Abr. 384. Hard. 176, 466, 395, 463, 468. Lane. 54.

Yet

Yet it ſhall be ſubject to the truſt in Equity. So if *A.* puts out 100*l.* at intereſt, in the name of *B.* who after becomes a *Felo de ſe*; *A.* may be relieved againſt the king upon this truſt in Equity, upon the * ſtatute of 33 *H.* 8. *cap.* 39. Yet if an Equity of Redemption is conveyed to *A.* in truſt for payment of debts, and the ſurplus to *B.* and *A.* agrees with the mortgagee to turn intereſt into principal; this agreement of the truſtee ſhall bind *B.* tho' he was no party to it. And ſo an infant ſhall be bound in ſuch caſe by the act of his truſtee or guardian, for we muſt diſtinguiſh betwixt importunate gain; as if the account were ſtated every ſix months, on purpoſe to load it: And where the intereſt is run up to a bulky ſum for here intereſt ought to be allowed for delay and forbearance, as well as in any other caſe whatſoever. * P. 73.

Sect. 2. But it ſeems a certain rule, that what a truſtee, or any other is compellable to do by ſuit, he may do without ſuit; as to join with *Ceſtuy que Truſt* intail in a feoffment; for they are truſtees merely to preſerve his Eſtate. So there being a remainder over in truſt to raiſe portions for daughters, if there were no iſſue, and there being a daughter, upon giving ſecurity for the daughter's portion, the truſtees ſhall be compelled to join in the recovery. So truſtees in a marriage-ſettlement for preſerving contingent remainders, (there being no iſſue,) may be decreed to join in a ſale, the ſettlement being only of an Equity of Redemption, and the wife conſenting to the ſale. But the huſband and wife being married twelve years, and having no iſſue, the Court will not force the truſtees to join in a ſale, tho' for payment of their debts; for that people have been married near twenty years without iſſue, and after have had children. And if truſtees appointed to preſerve contingent remainders, join in a conveyance to deſtroy the remainders 2 Vern. 346. 1 Eq. C. Ab. 386. 2 Vern. 303. 1 Vern. 181. 2 Salk. 676. Prec. Ch. 308. 1 P. Wms. 148.

before a ſon is born, this is a plain breach of truſt, and whoever claims under this conveyance having notice of the truſt, or by a voluntary ſettlement, ſhall be liable to make good the eſtates.

1 Vern. 144. 1 Vern. c. 327. 2 Ch. Ca. 138. *Sect.* 3. As to the allowances to be made to the Truſtee, regularly he is to have nothing for his own labour and pains, tho' ſome have thought this a great hardſhip. But if a truſtee ſued concerning the truſt in Chancery, obtain a diſmiſſion, and have coſts paid him, as in courſe, but the coſts allowed him and taxed are ſhort of his real coſts; and after a bill is brought by *Ceſtuy que Truſt* to have an account of his diſburſements, he ſhall be allowed his true and neceſſary coſts in the former ſuit, and not be concluded, *&c.* And the Law is the ſame of a * P. 74. mortgagee; for ſince the * keeping only is given *gratis*, it is plain, that all the expences laid out upon the charge ought to be repaid: And altho' where a mortgagee or truſtee manage the eſtate themſelves, there is no allowance to be made them for their care and pains: Yet if they employ a ſkilful bailiff, and give him 20 *l. per annum*, that muſt be allowed, for a man is not bound to be his own bailiff.

1 Vern. 316.

1 Vern. 144. *Sect.* 4. Nor will the Court ever charge a truſtee with imaginary values, but he ſhall be charged as a bailiff only. And altho' very ſupine negligence might indeed in ſome caſes charge a truſtee with more than he had received: Yet the proof muſt then be very ſtrong. So a truſtee for a charity is no otherwiſe, or further chargeable, than another truſtee is, *viz.* for ſo much as he receives. So a mortgagee ſhall account for what he actually did make, or might have done, had it not been for his willful default. And if a truſtee is robbed of the money he received, he ſhall be allowed it on account, the robbery being proved, altho' the ſum is only proved by his own oath, for he was to keep

1 Vern. 476, 477.

2 Ch. ca. 2.

it

it but as his own. So in caſe of a factor; for he cannot poſſibly have other proof. And ſo it ſeems of an executor. Nor is this without a good foundation in reaſon, for the contract is not for the truſtees, but the party's own advantage, and it was his fault to chooſe ſuch a one. And the interruption of acts of friendſhip do not oblige to reſtitution. But otherwiſe of a carrier, for he hath his hire, and thereby implicitly undertakes the ſafe delivery of the goods committed to him. 1 Inſt. 89. 4 Co. 84. Owen. 57. 1 Ro. Ab. 79

Sect. 5. But where they are more than one, there is a difference between truſtees and executors. For truſtees have all equal power, intereſt, and authority, and cannot act ſeparately, as executors may, but muſt join, both in conveyances and receipts; for one cannot ſell without the other, or deſire to receive more of the conſideration-money, or to be more a truſtee than his partner. And therefore it is againſt natural juſtice to charge them for each other's receipts, unleſs in caſe of neceſſity, where they ſo join in receipt, as not to be diſtinguiſhed, what has been received by one, and what by the other, there from their own neglect or default, both ſhall be charged with the whole. As if a man ſhould blend his money with mine; by rendering my property uncertain, he loſes his own. But executors have each an abſolute power over * the whole, and therefore if they join they truſt one another, *& ſic* diverſity. Yet a difference has been taken in the caſe of executors, as to creditors, and as to legatees. 2 Saun. 380. 1 Salk. 143. 1 Vern. 303. 2 Vern. 504. 515. 570. 1 P. Wm. 81. 1 Salk. 318 5 Ch. C. C. 283 2 Ch. C. C. 62 2 Vern. 570. 1 Salk. 318. * P. 75. 1 Salk. 318. 5 Ch. C. C. 283

Sect. 6. And in an action of account, there muſt be either a privity in deed by the conſent of the party, (as where he is his bailiff or receiver, for againſt a wrong doer an account will not lie,) or a privity in Law *ex proviſione Legis*, as againſt a guardian. And at Law, if the defendant is charged as bailiff of goods *ad Merchandizand'*, he ſhall anſwer

anſwer for the increaſe, and be puniſhed for the negligence, and have his expences and factorage allowed him. But if he is charged as receiver *ad computandum*, he ſhall anſwer only for the money, or thing delivered, except in caſe of joint merchants in favour of trade. So in Chancery, an executor or truſtee not being bound to lend, *&c.* if he do lend it is at his peril; and if it be by that means loſt, he ſhall anſwer the ſame out of his own eſtate, and therefore as he ſhall bear the loſs, he ſhall have the gain. But if the truſtee or executor were an inſolvent perſon at the time of placing out the truſt-money in the funds, or on other ſecurity, whereby he gains conſiderably; there the *Ceſtuy que Truſt* ſhall have the whole benefit gained thereby, as he only could have born the loſs, *aliter econtra.* And this is a fixed rule of the Court, and they will not change it, even where the executor calls in the money on good ſecurity. So where a factor, who is in nature only of a truſtee for his principal in Equity, tho' he has the right at Law, upon his account, demanded according to cuſtom allowance for ſo much paid for cuſtoms to the king in *India*, which it was inſiſted he had never paid, the factor ſhall have the benefit of the cuſtoms; for it was a duty to be paid, and the imployer could make no title to it againſt him that was in poſſeſſion, and he that has poſſeſſion, has right againſt all but him that has the very right. Otherwiſe of cuſtoms ſtolen from our own king; for that could not be called a cuſtom, being grounded upon fraud, and therefore the Court will order, that defendant ſhould anſwer, whether he paid the cuſtom or not.

Eq. Ca. Ab. 398. 2 Vern. 548. Prec. Ch. 1 Ch. Ca. 25. 76. 2 Vern. 638. 2 Ch. Ca. 30.

Sect. 7. And if a truſtee or executor compound debts or mortgages, or by them in for leſs than is due upon them, he ſhall not take the benefit of it himſelf, but other creditors and legatees ſhall have the

the advantage of it, and for want of them, the benefit ſhall go to the party, who is entitled to the ſurplus. So of an heir, unleſs he bought it to * protect an incumbrance to which he was entitled, or there be ſome ſpecial circumſtances in the caſe. But if one acts for himſelf, and being not in the circumſtances of a truſtee or executor, buy in a mortgage for leſs than is due, or for leſs than it is worth, he ſhall be allowed all that is due upon the mortgage; for he ſtands in the place of him that aſſigned, *viz.* the mortgagee, who might have given it to him *gratis*, and what is due muſt be the meaſure of our allowance, and not what he gave, for that might have been more than it is worth, as well as leſs, and ſince he runs the hazard, if a loſs happens, he ought to have the benefit, in caſe it turns to advantage. Yet the true reaſon ſeems to be this, that in the firſt caſe, he that takes upon him a truſt, takes it for the benefit of the perſon for whom he is truſted, and not to take any advantage to himſelf. But in the latter, as far as he did not purchaſe, it was a free gift, and one man ſhall not profit himſelf of the contract of another. But where there are ſubſequent incumbrances or creditors in the caſe,[b] there a man that buys in a prior incumbrance, ſhall be allowed only what he really paid, tho' there was in truth a greater ſum due. For *Nemo ex alterius detrimento fieri debet locupletior*, and therefore the taking away one man's accidental gain to make up another's loſs, is making them both equal. But the owner or his repreſentatives are no loſers, when they pay the whole money due.

* P. 76.

Eq. Ca. Ab. 329.

1 Vern. 476. [b.]

CAP.

CAP. VIII.

Of the Execution of the Truſt.

Sect. 1. WE will now ſhew, how the truſt ſhall be executed. And there may be many reaſons, why a Court of Equity would not decree a conveyance at all, (*viz.* of the legal eſtate by the truſtees) ſometimes for a politick reaſon: As if it were to enable a nobleman to ſuffer a recovery, and leave the honor bare without eſtate, or if the party were a notorious ſpendthrift, or when the eſtate-tail was only by implication. And ſo before the act tortious and troubleſome Uſes could not have been executed; for this Court, which has the juriſdiction of truſts, will ſee that they do no miſchief.

Eq. Ab. 392, 393. 2 Vern. 478.

Sect. 2. And it is agreed on all hands to be a declared rule in this Court, that if money be deviſed to be laid out in the purchaſe of lands to be ſettled on one and his heirs, that the perſon himſelf, for whoſe benefit the purchaſe was to be made, * may come into this Court, and pray to have the money itſelf, and that no purchaſe may be made, becauſe none have an intereſt in it but himſelf. But if he dies before the purchaſe made, or payment of the money, ſo that the queſtion comes between his heirs and executors, which of them ſhall have the money; the heir ſhall be preferred, and it ſhall for his benefit be conſidered in a Court of Equity, as if the purchaſe had been actually made in the life-time of his anceſtor, for two reaſons. 1*ſt*, Becauſe the heir is to be favoured in all caſes, rather than the executors, who by the old law were to have nothing to their own uſe. 2*dly*, If the executors ſhould

Prec. Ch. 544. 1 P. Wms. 486.

* P. 77.

ſhould have it, it would be againſt the words of the will, which gave it to the heirs. So if truſtees in a will have power to ſell the whole eſtate for payment of his debts, and that the reſidue ſhould go to *A.* and *B.* his wife, as they by any deed, *&c.* ſhould appoint. *A.* dies, and *B.* deviſes it to *C.* It muſt be conſidered in Equity, as if actually ſold, and go accordingly, in which caſe the money would have gone to the huſband, and ſo muſt the land too, elſe it would be in the power of truſtees to make it land or money, and ſo to give it to whom they ſhould think fit. Eq. Ab. 396

Sect. 3. But it is now conſtantly held in Chancery, that if lands are veſted in truſtees, to the uſe of one and the heirs of his body, with remainder over, that the truſtees are not to convey a fee but an eſtate-tail, tho' he will have power to bar the entail when the conveyance is made to him, and it would avoid circuity. So if a ſum of money be appointed to be laid out in a purchaſe, and the Lands to be ſettled in tail, the purchaſe, and ſettlement ſhall be made accordingly, and not the money paid the party; for the remainder-man has a chance for the eſtate, in caſe the tenant in tail in poſſeſſion die without iſſue before any recovery ſuffered, which he may omit through ignorance or forgetfulneſs, or he may be prevented by death, before he has compleated it. 1 Eq. Abr. 393. 394. 2 Vern 418. 1 P. Wms. 762. 1 Eq. Abr. 394. 395. 2 Vern. 551. 1 P. Wms. 88.

Sect. 4. And in the performance of a truſt, the Chancery has a power to alter the diſpoſition of the party upon emergent accidents, which he did not foreſee; and which if he had foreſeen, he would in all probability have ſettled his eſtate otherwiſe. As where *Ceſtuy que Uſe* willed, that his feoffees ſhould convey to his daughters, and died, and after his death a ſon is born, the feoffees ſhall convey to him; becauſe the *Ceſtuy que Uſe* never intended to diſinherit his heir at Law. Nor is this Court bound to decree * according to the ordinary rules of Law, Fitz. Subp. 2 Vern. 104. Sed. Quere.

* P. 78.

in conſtruction of wills, where the queſtion in a deviſe ariſes upon the performance of a truſt; as where *A.* having two daughters, and no ſon, makes a feoffment to the uſe of his will, and deviſes his lands to *J. S.* upon truſt and confidence *inter alia*, for the raiſing the ſums of money following, *viz.* if he has but one daughter, than 12000*l.* to her fortune, if two or more 20000*l.* amongſt them, equally to be divided, the ſame to be due and payable at their ſeveral ages of twenty-one years or marriage, which ſhall firſt happen, with a proviſion for maintenance in the mean time, *A.* left three daughters, and one died under age, *&c.* here being an apparent intention, that theſe two daughters ſhould have 10000*l.* a-piece, this Court will comply with it, notwithſtanding any accident that might happen to the contrary.

2 Vern. 513. *Sect.* 5. So where an executrix has a general power or truſt to diſtribute a ſum of money amongſt children at diſcretion; an unreaſonable and indiſcreet diſpoſition may be controlled in a Court of Equity. But otherwiſe where the power is ſpecial and particular; as that the wife might diſpoſe to one or more; for this is *caſus proviſus*, and it is expreſly provided, ſhe might give all to one. Yet it is now held diſcretionary in the court to relieve here or not, ſince ſuch clauſes are for the moſt part to preſerve obedience only. So the power given by will
2 Vern. 414. 2 Vern. 421. to diſpoſe of a perſonal eſtate by an executrix being general, to diſtribute to the uſe of herſelf her brothers and ſiſters, according to their need and neceſſity, as in her diſcretion ſhe ſhould think fit; the heir ſhall have a double ſhare, being moſt in need of
2 Vern. 153. it. And if one deviſe to two of his ſiſters 400*l.* a-piece, and to his third ſiſter, what his executors ſhould think fit; the third ſiſter ſhall have 400*l.* alſo, and be made equal to her two other ſiſters, if the eſtate will hold out. So where the teſtator deſires

fires him to give 100*l.* to *A.* if his executor thought fit; this ſeems to be a truſt in their hands, tho' no circumſtances of hardſhip in the caſe.

Sect. 6. As for the general rule, that portions may be raiſed by the ſale of reverſionary terms in the life of the tenant for life, it cannot be got over: Tho' on the other ſide, there are caſes where it has been refuſed. But this muſt depend upon the circumſtances of the deed, and the intent of the parties. And 1*ſt*, If a portion is directed to be paid at eighteen, or day of marriage, and the term is * abſolutely veſted; there the daughter ſhall not expect during the life of the father; but it may be ſold in the father's life-time, altho' a term in remainder and not in poſſeſſion, 2*dly*, If the truſt of the term had been upon a condition precedent, as to commence if the father die without iſſue male by his wife, in truſt to raiſe portions for his daughters; there, if the wife be dead without iſſue male, leaving a daughter, tho' the father is living, the term has been decreed to be ſold. For in Equity, the father is taken to be dead without iſſue, when the wife is dead, by whom he was to have iſſue; all that is contingent there, has happened by the death of the wife without iſſue male; and the huſband muſt alſo one time or other die, as all men muſt, and whenever he dies, he muſt die without iſſue male by that marriage, his wife being dead before. So that this is in truth a remainder, and depends no longer upon a contingency; and this Court, as in ſome caſes they do prolong the time, ſo here they have ſhortened it. And thus far the Court has gone for convenience, that young women may have their portions, when they moſt want them: Or elſe the father might live ſo long, that the portion might be of little ſervice. 3*dly*, But if the agreement is, that the portion ſhould be paid after his death, it is hard to make it payable in his life-time. For

Eq. C. Ab. 338. 1 Salk. 156. 2 Vern. 640. * P. 79. 656. 3 Ch. Rep. 190. 2 Jones 201 2 Vern. 636. Eq. Ca. Ab. 338. 2 Vern. 657.

it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them, and the cases on this head have gone too far already, and mangled all estates, and therefore they will never decree portions to be raised in the father's life-time, where it can possibly bear any other construction.

Eq. Ca. Ab 340.

Sect. 7. And there is no difference where the portion is secured by a settlement, or will, if secured out of a real estate, and the party dies before it is payable; in either case it sinks in the lands. But the difference is, between a personal legacy, which in such case being *debitum in præsenti* tho' *solvendum in futuro*, and governed merely by the Ecclesiastical Law which is so, shall go to the executor or administrator, and a sum of money appointed to be raised, out of the rents and profits of lands, and designed for a particular purpose; as a portion for a daughter, payable expressly at twenty-one, or marriage, for which there was no occasion, she dying under age and unmarried.

Eq. Ca. Ab. 295. Dyer 59. 1 Leon 171. Swinb 311, 313. 2 Vern. 416.

* P. 80.

* P A R T. II.

Of Public Trusts.

C A P. I.

Of Charities.

See a collection & review of the cases upon charities. Vol. 4 Wheat. app.

Sect. 1. THE preservation of every private man's goods in particular, is the preservation of the common wealth in general. And therefore in every good government, the magistrates ought to

to have a ſpecial care and regard of the eſtates of orphans, madmen and prodigals. So anciently in this realm, there were ſeveral things that belonged to the king as *Pater Patriæ*, and fell under the care and direction of this Court; as charities, infants, ideots, lunaticks, *&c.* afterwards ſuch of them as were of profit and advantage to the king, were removed to the Court of Wards, but by the ſtatute, upon the diſſolution of that Court, came back again to the Chancery. And altho' it was formerly doubted, if the Court could by bill take notice of the ſtatute of 43 *Eliz. cap.* 4. for Charitable Uſes, ſo as to grant a relief according to that ſtatute upon a bill, but that the courſe preſcribed by that ſtatute by a commiſſion of Charitable Uſes muſt be obſerved in caſes relievable by that ſtatute: Yet now it is agreed, that the Chancery may relieve upon an original bill in theſe caſes. But a ſchool for the inhabitants of *A.* not being a free ſchool, is not a charity within the ſtatute of *Eliz.* and conſequently the inhabitants have not a right to ſue in the Attorney General's name.

2 Vern. 342.

1 Ch. Ca. 158.

2 Vern. 387.

Sect. 2. And tenant in tail may diſpoſe of a charity out of his land, without fine or recovery, and even by will, by virtue of the conſtruction, which has been made on the 43 *Eliz.* the ſtatute of Charitable Uſes ſupplying all defects of aſſurance, either in the giver or receiver, where the donor is of capacity to diſpoſe, and hath ſuch an eſtate, as is any way diſpoſable by him, whether by fine or recovery; for the intent of the ſtatute of Charitable Uſes was to make the diſpoſition of the party as free and eaſy as his mind, and not to oblige him to the obſervance of any form or ceremony. But if a man diſpoſe of a charity by will, and ſuch will wants the neceſſary circumſtances required by the ſtatute of Frauds and Perjuries, it ſhall not operate as an appointment; for the ſtatute of 43 *Eliz.*

2 Vern. 453, 755. Duke's Chn. Uſes, 109, 110.

2 Vern. 597. 1 Salk. 163. Prec. Ch. 270, 390.

* P. 81. *Eliz.* is now repealed *pro * tanto*, and tho' there were three ſubſcribing witneſſes to the codicil, yet that would not ſupport the will. But as to ſuch of the lands as were copyhold, it was agreed, they were well appointed, they paſſing by ſurrender, and not by the will. So a deviſe in mortmain is good as an appointment to a charity within the 43 *Eliz.* But ſee now the late ſtatute 10 *Geo.* 2.

Duke's Cha. Uſes, 110.

Hob. 126. 1 Lev. 284. 2 Vern. 454.

Sect. 3. But whenever any thing is given to charity, and no charity appointed, or if the charity which is appointed be ſuperſtitious, there the king ſhall appoint. And altho' a deviſe cannot be averred to be to a ſuperſtitious uſe, by reaſon of the ſtatute of frauds, yet the king is not bound by that ſtatute. So of an uncertain as well as void Uſe; for the Uſe is void, and not the charity, yet in the caſe of a ſuperſtitious Uſe, the appointment ſhall be to a charitable Uſe *ejuſdem Generis*; for the appointment of that good uſe to which it ſhall be applied, is a judicial act, and ought to be according to the rules of the Court. And altho' the charity cannot take place according to the letter, yet it ought to be performed *cy pres*, and the ſubſtance purſued. But where the appointment is good, it ſhall not be in the power of the heir by his conſent to alter the diſpoſition of his anceſtor; for they ſhall be held to the letter of the charity. Much leſs of the truſtee or the pariſhioners.

1 Vern. 124. 1 E. C. a. 14. Cro. Jac. 51 4 Co. 104. Duke's ch. Uſes, 106. Salk. 162. 1 Vern. 248.

2 Vern. 266

1 Vern. 55.

1 Vern. 55

1 Vern. 42. Duke's Ch. Uſes, 94.

Sect. 4. And where, in the conſtitutions for founding an hoſpital, it was ordained, that no leaſe ſhould be made for above twenty-one years, and the rent not to be raiſed, nor above three years rent taken for a fine, tho' the tenant of the hoſpital lands is intitled to a beneficial leaſe upon renewal, the conſtitution being juſt and charitable, for the encouragement of the tenant: Yet this conſtitution is not to be followed according to the letter, but in the reaſon of it, as fines alter, and the price of proviſions increaſe,

2 Vern. 596. 746.

increaſe, ſo the rent ought to be raiſed in proportion. So if the hoſpital makes a leaſe for twenty-one years, with a covenant by renewal to make it up ſixty years, and by deed of covenants the leſſee covenants to pay all additional rents: This covenant is not binding in equity, as being equally prejudicial to the hoſpital, as a leaſe for ſixty years. And the corporation are but truſtees for the charity, and might improve for the benefit of the charity, but could not do any thing to the prejudice of the charity in breach of the founder's rules. But the additional rent and arrears ſhall be paid during the term of twenty-one * years, for tho' it was an indenture of mutual covenants on the leſſor's part to renew, and on the leſſee's part to pay the additional rent, thoſe covenants appeared in the deed to have been made on diſtinct conſiderations, *viz.* the covenant for increaſe of rent, becauſe the price of proviſions was raiſed, and the covenants for renewal, becauſe the leſſee undertook to lay out 100*l.* in buildings.

2 Vern. 411.

2 Vern. 412

* P. 82.

Sect. 5. And if *A.* ſeized of a manor, of the yearly value of 240*l* deviſes ſeveral legacies, and particularly to his heir at Law 40*s.* and then adds; that being determined to ſettle for the future, after the death of me and my wife, the manor of *P.* with all lands, woods and appurtenances to charitable uſes, I deviſe to *M. N. &c.* upon truſt, that they ſhall pay yearly, and for ever, ſeveral particular ſums to charitable uſes, amounting in the whole to 120*l. per Annum*, and gives the truſtees ſomething for their pains; their being an overplus, it ſhall go in Augmentation of the charities, it appearing to be the teſtator's intent to ſettle the whole manor, and that the heir ſhould have no more than the 40*s.* So where the reverſion in fee of divers lands lett on leaſes on which in all 70*l. per Annum* was reſerved, was granted by king *H.* 8. to the corporation

Show. P. C. 22.

2 Vern. 397.

corporation of *Coventry*, 400*l.* of the purchaſe-money was paid by the corporation, and 1000*l.* by Sir *T. W.* but in the grant, the corporation was ſaid to be the purchaſers, and it was by the deed declared that the whole 70*l. per Ann.* ſhould be applied to ſeveral charities therein mentioned, the leaſes expiring, the value of the lands were greatly increaſed, but the ſurplus had been all along received by the corporation of *C.* the lands themſelves not being given to the charities, but particular rents out of the lands; and it was ſtrongly inſiſted, that the articles mentioning the corporation to be purchaſers, there could be no averment received to the contrary, and altho' a charity is not barred by length of time, or any ſtatute of limitations, yet it is an evidence, that the ſurplus belonged to *C.* becauſe they have enjoyed it ever ſince the purchaſe, but the defendants were ordered to account for the improved value of the land, and the charities to be augmented in proportion.

*P. 83.

*CAP. II.

Of Guardians of Infants and Lunaticks.

Sect. 1. †THE king is alſo an univerſal guardian to infants, and ought in the Court of Chancery

† There are in Law ſeveral kinds of Guardians.

As 1*ſt*, *Jure Naturæ*, the Father of his Heir apparent till twenty-one; and this was inſeparable from his Perſon.

2*dly*, In Socage, *Jure Gentium*, the next of Kin to whom the Lands could not deſcend; and this was only of Things, that lie in Tenure till fourteen: Of others he might chooſe a Guardian, if he was of Years to make a Choice.

3*dly*, By the Statute of 12 *Car.* 2. *cap.* 24. formed by Sir *Matthew Hale*; and this is in Office and Intereſt much the ſame with a Guardian in Socage. But it extends not to his Lands by Deſcent only, as that did, but to all his Eſtate whatever, and may be till twenty-one, or any leſs Time.

4*thly*, By Cuſtom, as in *London*, and other Boroughs.

5*thly*, The Spiritual Court, of Perſonal Eſtate only.

6*thly*, The King, for Allegiance and Protection are reciprocal.

Chancery to take care of their fortunes. As 1*ſt*, If they marry during their minority, to procure a ſettlement; for tho' by the eccleſiaſtical Law, a woman is of age to marry; yet by the temporal Law, ſhe cannot diſpoſe of her fortune, and therefore the Court will make ſuch a diſpoſition of the fortune of the ward, as may be moſt beneficial for her. But if ſhe was of full age at the time of her marriage, then ſhe was out of the care of the Court; and the Court cannot at all interpoſe, tho' ſhe be under age, as ſome ſay. But where the huſband is plaintiff here in Chancery to have the truſtees tranſfer their eſtate, or for any other favour of the Court; then indeed when they had ſuch a hand upon him, they may make him do ſuch things as ſhall be reaſonable, otherwiſe there is no colour in it. 2*dly*, This Court, upon application made to it by guardians, has ſettled the maintenance of infant's. And a Court of Equity may, by the approbation of an infants relations, allot the infant maintenance out of a truſt-eſtate, tho' there be no proviſion in the truſt for that purpoſe: And this is founded on natural Equity. But Chancery never allows the principal to be leſſened in maintenance of an infant. 3*dly*, If a man intrudes upon an infant, he ſhall receive the profits but as guardian, and the infant ſhall have an account againſt him in Chancery as guardian. For in the conſideration of this Court, he ſhall be looked upon as truſtee for the infant. And if a man, during a perſon's infancy, receives the profits of an infant's eſtate, and continues to do ſo for ſeveral years after the infant comes of age, before any entry is made on him; yet he ſhall account for the profits throughout, and not during the infancy only. And ſo it ſeems * at Law, he ſhould be charged in an action of account, as *Tutor Alienus*.

1 Vern. 40.

2 Vern. 236.

1 Vern. 255, 295.

2 Vern. 342. 1 Eq. Abr. 180.

* P. 84.

Sect. 2. Guardians are appointed by writ for infants, and one or more guardians jointly, and

2 Ch. Ca. 163

the Court of Chancery may aſſign one of the ſix clerks to be guardian to an infant. But a guardian cannot be otherwiſe appointed than by bringing the infant into Court, or his praying a commiſſion to have a guardian aſſigned him. And where there is guardianſhip by the Common Law, this Court will intermeddle and order: But if there be a guardian by act of parliament, it cannot remove him or her. Yet in this, and all the other like caſes, they ſhall give ſecurity not to marry the child, *infra annos nubiles*, or conſent, or be aiding to the marriage of ſuch child, *poſt annos nubiles*, during minority, without acquainting this Court therewith. But the Chancery cannot reſtrain the infant from marriage *ad annos nubiles*. But if a perſon appointed guardian purſuant to the ſtatute, (*viz.* 12 *Car.* 2. *cap.* 14.) dies, or refuſes to take upon himſelf the guardianſhip, the Lord Chancellor may appoint a guardian. As to the cuſtody of lunaticks, it is no queſtion of right, but of prudence, and where no right there is no wrong. It ſhall never in this or in any other caſe be committed to any that will make gain of it, or who is concerned to outlive the lunatick, as being neareſt of blood, and entitled to the adminiſtration; and the allowance muſt be liberal and honourable.

1 Eq. Ab. 260. By petition 1 Mad. 207

2 Ch. Ca. 238.

1 Eq. Ca. Ab. 260.

1 Eq. Ca. Ab. 260, 261. 3 Ch. Rep. 58. 1 Vern. 442. 2 Ch. Ca. 239

2 P. Wms. 544, 638. Contra.

Sect. 3. A tutor or guardian was looked upon in the Civil Law, to be in the place of a father to the minor, who by reaſon of the infirmity of his age, was deemed unable to take care of himſelf, and the particulars of his charge was, 1*ſt*, Of his perſon and education, and to lay out all reaſonable expences for him in proportion to the value of his eſtate, ſince it was not his eſtate alone, but his morals, that he was appointed to look after. But in the ſecond place he was to take care of his patrimony, and to be as provident of his affairs as a prudent maſter, of a family is of his own, and the power of

of the tutor was limited to what might be profitable to the minor, for ſo far they thought this authority eſtabliſhed by juſtice itſelf. And ſo it ſeems formerly in the Law of *England*, he that was conſtituted tutor or guardian, ought to ſee, that the heir be well brought up, and that his eſtate be ſafely kept; for he can do nothing but for the profit and benefit of the infant, nor intermeddle with any thing but of what he may render an account. And he was bound to * put in ſecurity before his admiſſion, and to make oath to adminiſter the affairs of the minor to his profit and benefit, to exhibit a true and faithful inventory of all the goods, and to render an exact and true account of his office, whenſoever it was required by the judge, which is the ſame oath, that was adminiſtered to all executors and adminſtrators. But this Law is not now obſerved here, as it was in *Rome*, to the great detriment of many minors. But both in Chancery and in the Civil Law, an infant might call his guardian to an account, even during his minority, if there fell out any thing that made it neceſſary.

* P. 85.

2 Vern. 342. 5 John. C. C. 283.

BOOK III.

CAP. I.

Of Mortgages and Pledges.

THEIR NATURE.

Sect. 1. IT follows in the next place, that we treat of mortgages and pledges. This kind of agreement was uſeleſs in a ſtate of nature; becauſe it was lawful for the debtor in that ſtate, to ſeize on any part of the creditor's goods or eſtate, without any ſpecial contract. For right reaſon, and the

1 Eq. Ca. Ab. 311.

nature of ſociety prohibits not all force, but that which is repugnant to ſociety; that is, which depriveth another of his right. For the end of ſociety is, that by mutual aid, every one may enjoy his own. And as naturally every man may vindicate his own right, ſo to profit another, in what he can juſtly, is not only lawful but alſo commendable. But civil ſociety being ordained for the maintenance of tranquility, there ariſes preſently to the commonwealth, a certain greater right over us, ſo far as is neceſſary to that end; and therefore ſo far it may and will prohibit that promiſcuous right of reſiſting. Nor were there any mortgages of lands with us, while the feudal tenures were on foot; becauſe ſuch conveyances were looked upon as a ſort of fraud on the conſtitution. But when a licence of alienation was given about the time of *H.* 3. and it became a maxim in Law, that the purity of a fee-ſimple imported a power of diſpoſing of it, as the owner pleaſed: There were two ways of pledging lands introduced, which *Littleton* diſtinguiſhes by the names of *Vadium vivum*, and *Vadium mortuum*. The firſt is, where a man borrows a ſum of money of *another, and makes an eſtate of lands to him, until he hath received the ſame out of the iſſues and profits: So that neither the money nor the land dies, or is loſt. The other, where a feoffment is made upon condition, that if the feoffor pay to the feoffee ſuch a ſum by ſuch a day, that then the feoffor may enter, *&c.* in this caſe, if he does not pay, then the land is taken from him for ever, and if he does, then the pledge is dead as to the tenant, *&c.*

2 Eq. Ca. Ab. 311.

* P. 86. Inſt. 205

Lit. Sect. 334.

Sect. 2. Theſe ſorts of conveyances, being uſually made in fee-ſimple, were expoſed to many inconveniances. For the eſtate becoming abſolute at Law, on default of payment, was ſubject to the dower of the wife of the feoffee, and all other his

1 Inſt. 222. 2. 2. Cr. Car.

real

real charges and incumbrances; and therefore to prevent this, the ancient courſe in mortgages was to join another with the mortgagee in the conveyance. But the Court of Chancery, tho' at firſt they made a ſcruple of breaking in upon the rules of Law, have now ſet this matter right, and ſince the lands were originally only a ſecurity for the money, therefore the payment of the money doth in conſideration of Equity put the feoffor in his firſt eſtate, as well after as before the condition broken. Hardr. 465. 469.

Sect. 3. And altho' with reſpect to the ſurplus of the eſtate over and above the mortgage-money, the mortgagee is uſually looked upon in Equity, as a truſtee for the mortgagor: Yet their is a difference betwixt a truſt and a power of redemption. For a truſt is created by the contract of the party, and he may direct it as he pleaſes, and may provide for the execution of it, and therefore they only are bound by it, who come in privity of eſtate, or with notice, or without a conſideration. As a tenant in dower is bound by it, becauſe ſhe is in the *Per:* But not a tenancy by the curteſy who is in the *Poſt.* Nor ſhall any other, who comes in in the *Poſt*, be liable to it, without expreſs mention made by the party. But a power of redemption is an equitable right inherent in the land, and binds all perſons in the *poſt*, or otherwiſe; becauſe it is an ancient right, which the party is intitled to in Equity. And altho' by the eſcheat, the tenure is extinguiſhed, that will be nothing to the purpoſe, becauſe the party may be recompenced by the Court for that, by a decree for rent, or part of the land itſelf, or ſome other ſatisfaction. And it is of ſuch conſideration in the eye of the Law, that the Law takes notice of an Equity of redemption, and makes it aſſignable, or deviſable.

* *Sect.* 4. And Equity is part of the Law of *England*, ſo that it cannot any manner of way be provided * P. 87.

by

2 Ch. Ca. 61 by agreement, in caſe of a mortgage, that the Court of Chancery ſhould not give relief. For ſuch an agreement would be contrary to natural juſtice in the creation of it, and prove a general miſchief; becauſe every lender would by this method make himſelf Chancellor in his own caſe, and prevent the
2 Vern. 520, 521. judgment of this Court. Neither ſhall a man have intereſt for his money, and a collateral advantage beſides for the loan of it, or clog the redemption with any by-agreement, ſince this would be to let
1 P. Wm. 262. in all manner of extortion and uſury. But their is a difference between mortgages of exchequer-annuities and common ſtock, the value of which depends upon imagination, rather then a real value: For annuities are a certain ſecurity, and carry a conſtant intereſt, and therefore are to be conſidered, as mortgages of lands, and cannot be ſold after forfeiture without foreclоſure. Yet annuities mortgaged are now held irredeemable after forfeiture, unleſs there be an expreſs agreement, that the mortgagee may ſell after forfeiture, upon a notice without a foreclоſure.

Sect. 5. And notwithſtanding, that in a common mortagage, ſuch covenants ought not to be regarded, for the general inconvenience that would follow; yet this reaſoning cannot extend, where it is made with an intention to ſettle his eſtate, beſides the conſideration of the money paid. As where
2 Vent. 364. 3 Vern. 7, 214, 232. the conveyance is in conſideration of 1000*l.* paid to him by a perſon that married his kinſwoman, upon condition, that if he did not repay the money with intereſt during his life, his heirs, *&c.* ſhould then have no power to redeem; this Court can neither ſhorten, nor enlarge the time that is given by expreſs covenant and agreement of the parties.
1 Vern. 269. So where there is a clauſe or proviſion to re-purchaſe in a conveyance, the time limited ought preciſely to be obſerved. But then this muſt be in caſe the Court

Court are fully ſatisfied, that it was not originally a mortgage, but an abſolute purchaſe: Or elſe a redemption may be decreed at any time within twenty years after the time of re-purchaſing is out.

Sect. 6. And in Equity there is no time limited for the redemption of a mortgage, and the common doctrine in the Court of Chancery is, that mortgages were not within the ſtatute of limitations; however that ſtatute may be mentioned ſometimes as a proper direction to go by; for the Courts of Equity are tender of ſettling any ſet time, becauſe there can be no queſtion in whom the property of the * pawn is, when I poſſeſs it as another's, and preſcripton was introduced only to put an end to ſuits, and ſettle property, which would otherwiſe be uncertain. Beſides, a man can never be injured, if he receives principal, intereſt, and coſts: But the proprietor of the land is injured, if he parts with his poſſeſſion under the true value. Yet where a man comes in at an old hand, the poſſeſſor ſhall account no further than for the profits made in his own time, and upon extraordinary circumſtances, it may be reaſonable to debar him altogether of the power of redemption, and ſo this Court ſometimes hath allowed length of time to be pleaded in bar, when the mortgaged eſtate hath deſcended as a fee, without entry or claim from the mortgagor, and where the poſſeſſor would be entangled in a long account.

1 Ch. ca. 102. 1 Ch Rep. 97, 184, 206. 1 Eq. Ca. Ab. 313, 314. 2 Vern. 418. 3 P. Wm. 287. n.

* P. 88.

Sect. 7. And it ſeems, now the Court will not relieve mortgages after twenty years, for the ſtatute of 21 *Jac. cap.* 16. did adjudge it reaſonable to limit the time of one's entry to that number of years, unleſs there are ſuch particular circumſtances as may vary the ordinary caſe, as infants, feme coverts, *&c.* which are provided for by the ſtatute itſelf. And altho' theſe matters in Equity are to be governed by the courſe of the Court: Yet it is beſt to ſquare the rules of Equity, as near the rules of reaſon

2 Vent. 340.

ſon and law as may be. So if there were infants:
2 Vern. 418, 419. Yet the time having begun upon the anceſtor, it ſhall run even upon infants, as it is at law, in the
2 Vern. 377. caſe of a fine. But where a bill has been brought, and an account within twenty years, a redemption
1 Vern. 418. Prec. Ch. 423. may be decreed upon the foot of that account. So if the mortgagor agreed the mortgagee ſhould enter, and hold till he was ſatisfied; this is in the nature of a *Welch* mortgage, and in ſuch caſe the length of time is no objection.

Sect. 8. And this Court cannot ſhorten the time of redemption which the parties have agreed upon, but when that is paſt, the practice is to foreclose.
2 Ch. Ca. 264. Yet at the Common Law, in the caſe of infants, the parol was to demur, and the infant is not bound to anſwer till full age, and the regiſter, parliament and Common Law give no execution againſt an infant heir, tho' the debt were clear and indiſputable as by a judgment or ſtatute: But the contrary is
2 Vern. 342. done in Chancery. However in Equity, the intereſt of infants is ſo far regarded and taken care of, that no decree ſhall be made againſt an infant without
1 Vern. 295. having a day given him to ſhew cauſe after he comes of age. And there being an infant * in the caſe,
* P. 89. we cannot foreclose him without a day to ſhew cauſe after he comes of age. But the proper way
1 Vern. 296. in ſuch a caſe, is to decree the lands to be ſold to pay the debts, and that will bind the infant. So
2 Vern. 429. Prec. Ch. 185. if lands are deviſed to be ſold for payment of debts, the lands may be decreed to be ſold, without giving the heir, who is an infant, a day to ſhew cauſe, when he comes of age; for nothing deſcends to
2 Vern. 224. him. But if he is decreed to join in the ſale, he muſt have a day after he comes of age. But altho' if an infant anſwer by guardian, upon which a decree is made, without any day given him to ſhew
Eq. Ca. Ab. 281. cauſe, it ſhall not be read or admitted as evidence againſt him, when he comes of age; yet an infant

ſhall

ſhall be bound by an offer made by him in his anſwer, if the other ſide are thereby delayed, and he do not immediately after his coming of age apply to the Court, in order to retract his offer, and amend his anſwer. And where an infant is plaintiff, he cannot amend his bill in any point where it has been diſmiſſed upon the merits. So if a man by fraud or forgery gets into poſſeſſion of an eſtate, and ſoon after dies, leaving his heir an infant, it would be hard his infancy ſhould protect him from pleading or anſwering; for neither law nor reaſon can entitle him to poſſeſs an eſtate got by the fraud of the father. And ſome ſay, there is ſcarce any caſe, where an infant hath time to ſhew cauſe againſt a decree, but where it is neceſſary for him to join in a conveyance, as in caſe of foreclоſure or the like. 1 Eq. Abr. 281.

Sect. 9. By the Civil Law, the mortgage is properly a ſecurity only for the debt itſelf, for which it was given, and the conſequences of it, as the principal ſum, and intereſt, and the coſts and damages laid out in preſerving it. But he that will have Equity to help, where the law cannot, ſhall do Equity to the party, againſt whom he ſeeks to be relieved. And upon this rule a mortgage given as a counter-ſecurity to a joint obligee ſhall ſtand as a ſecurity for a ſecond joint bond, entered into by the ſame perſons afterwards, without any agreement for that purpoſe; and the heir ſhall not redeem without ſaving harmleſs againſt both. So if the mortgagor borrows more money of the mortgagee, and gives bond for it, the § heir of the mortgagor ſhall not redeem without alſo paying the debt by bond, if that the mortgagor bound himſelf and his heirs in the bond; for it is a known rule in Equity, that where there is an eſtate ſubſiſting at law, Equity will 1 Ch. Ca. 97. 2 Ch. Ca. 164. 2 Ch. Rep. 217. 1 Vern. 245. 2 Ch. Ca. 194, 195. Prec. Ch. 407, 512. 1 P. Wms. 775.

§ But the Alience of the Heir may redeem upon Payment of Mortgage-Money only. *Prec. Ch.* 511. 1. *P. Wms.* 775.

* P. 90. will not deſtroy * it, unleſs the party redeeming will ſatisfy all equitable demands out of the eſtate. And the law is the ſame of an executor, in caſe of a mortgage of a leaſe for years, tho' no ſpecial agreement, that the bond-debt ſhould ſtand ſecured by the mortgage. So of the mortgagor himſelf, he muſt pay all that was due on note, or ſimple contracts, or bonds. But this laſt point has been denied by ſome, and a diverſity taken between the mortgagor himſelf and his heir; for the land in the hands of the heir is chargeable with the bond-debt even at law. And ſince the ſtatute againſt fraudulent deviſes, the deviſee of the Equity of redemption is in the ſame caſe with the heir; becauſe the ſtatute makes ſuch deviſe void, as againſt creditors; but before that ſtatute, ſuch deviſee would not be liable to the bond-debt.

2 Vern. 177. Prec. Ch. 18, 512.

2 Vern. 244 Prec. Ch. 407.

1 Eq. Ca. Abr. 325.

2 Vern. 691, 698.

Sect. 10. As for pawns, they differ in this reſpect from mortgages, as appears by the following caſe. *A.* pawned ſome jewels to *K.* who ſigned a writing, that they were to be redeemed in twelve months, otherwiſe they were to be as bought and ſold: *K.* within a ſhort time after, delivers over the jewels, together with ſome plate of his own to *M.* as a pledge for 200 *l.* and *K.* afterwards borrowed 30 *l.* and 50 *l.* of *M.* on promiſſory notes to be repaid on demand: Altho' *M.* was a bookſeller, and did not deal in plate or jewels, and ſo had not gained any property, as having bought in a market overt, yet it is natural to think, altho' he took notes for the 30 *l.* and 50 *l.* that the pawn was not to be parted with, until that money, as well as what was before lent, was paid. And it is to be looked upon as an account current between *K.* and *M.* and therefore he might retain what he had in his hands, until the ballance was paid: But the goods of *K.* which were pawned are to be firſt applied, as far as the value thereof would extend, and if there be creditors of a higher

higher nature, this ſhall not give him any preference.

Sect. 11. But in this both pawns and mortgages agree, that the act, for which the defendant is to pray Equity againſt the plaintiff, muſt be done to the plaintiff himſelf, or to his repreſentative. For if the mortgagor mortgage the Equity of Redemption, and the ſecond mortgagee brings a bill to redeem, he ſhall not be obliged to pay the bond-debt, ſince the money was not lent to him. So the aſſignee of the Equity of Redemption ſhall not be affected by a judgment after confeſſed by the mortgagor, tho' the judgment-*creditor purchaſe in the mortgage; but ſhall redeem upon payment of the firſt mortgage-money only. So if tenant for life, remainder to his ſon in tail, mortgage the lands, and the ſon after borrow money of the mortgagee, and give the lands as a ſecurity: Yet he may redeem without paying his father's mortgage, for the ſon is a ſtranger to the father, and all one as ſtranger.

1 Eq. Ca: Ab. 326. Bac. Abr. vol. 3. 650.

* P. 91.

2 Ch. Ca. 23

Sect. 12. But further the mortgagee is to be conſidered, as a creditor beyond the ſecurity he has taken. As where *A.* lent a ſum of money on the mortgage of ſome houſes, and had a bond for payment of the money, as uſual in ſuch caſes; afterwards he lent a ſum of 2000 *l.* on the Equity of Redemption, and had a bond for that likewiſe; and then the mortgagor becomes a bankrupt, and by ſome accident, the value of the houſes ſunk ſo much, that they were not ſufficient to raiſe the mortgage-money firſt lent; on a bill brought to have them ſold, and that as to ſo much as they fell ſhort to anſwer the firſt mortgage-money, the mortgagee might come in upon his bond, as a creditor, it muſt be ſo decreed and as to the 2000 *l.* lent upon the Equity, which was worth nothing, it muſt ſtand ſingly upon the bond. So where a man borrows money

1 Eq. Ca. Ab. 129. 3 P. Wms: 300.

money on the mortgage of a ſhip, and covenants to repay the inſurance-money, but there was no covenant for re-payment of the principal money itſelf; the mortgagee treated with a perſon concerning the inſurance, but could not agree for the rate, and thereupon the ſhip went out, and was loſt in the voyage; ſince, if he had taken no ſecurity at all for his money, he had then without queſtion been a creditor by ſimple contract, ſurely the taking ſecurity ought not to put him in a worſe condition, eſpecially now the ſecurity being loſt. And in caſe of pawns even at the Common Law, if the pawn is loſt without the default of the pawnee, he may have an action for his money againſt the pawnor.

Sect. 13. Yet notwithſtanding that by the Common Law, the mortgagee of lands has an abſolute intereſt, and by the covenant for quiet enjoyment, *&c.* till default of payment, the mortgagor is but tenant at will to the mortgagee; in natural Juſtice and Equity, the principal right of the mortgagee is to the mortgage-money, and his right to the land is only as a collateral ſecurity for the payment of it. And therefore all mortgages are to be looked upon as part of the perſonal eſtate: Unleſs the mortgagee in his life-time, * or by his laſt will do otherwiſe declare or diſpoſe of the ſame. And in regard the money came firſt out of the perſonal eſtate, the law always gives the money to the executor, where no perſon is named: And where the election to pay, either to the heir or executor, is gone and forfeited in law, it is all one in Equity, as if neither heir or executor were named, and therefore to have a certain rule in theſe caſes, Equity ought to follow the law and give it to the executor. And the right to a ſum of money, which is a perſonal duty, ought always to be certain, and not variable upon circumſtances; ſo that whether there

1 Johns. R. 557

* P. 92.

2 Ch. Ca. 50, 51, 220
1 Ch. Ca. 283
2 Vent. 348, 351.
1 Ch. Rep. 183.
1 Ch. Ca. 88.
Hard. 46.
1 Vern. 179, 412.
1 Eq. Ca. Abr. 325.
2 Ch. Rep. 155, 242.

are

are aſſets or not, or there wanted the circumſtances of a perſonal covenant to pay the money, is not material. So altho' the mortgagee be foreclоſed, or it be of ſo ancient a date, as in the ordinary courſe of the Court not redeemable: Yet in caſe the mortgagee be not actually in poſſeſſion, it ſhall be looked upon in his hands to be perſonal eſtate. But if the land be worth more than the money, the heir may well ſay, I will pay you the money, and take the benefit of the foreclоſure to myſelf. 1 Vern. 67.

CAP II.

Of Marſhalling the Aſſets.

Sect. 1. AND altho' the money ſhall not be paid to the heir or aſſignee of the land, without naming him in the condition: Yet the money may be paid by them in preſervation of their inheritance, *& qui ſentit onus ſentire debet & commodum.* And it is Equity that ſhould make ſatisfaction, which received the benefit. As where the heir is indebted by mortgage made by his father, or by bond, or by other means, as heir to his anceſtor, the perſonal eſtate in the hands of the executor ſhall be compelled to pay that debt in eaſe of the heir; and eſpecially in caſe their be ſufficient to pay the debt by the mortgage, *&c.* and the legacy out of the perſonal eſtate; for when both can be ſatisfied, both ſhall be ſatisfied. The reaſon is, becauſe the perſonal eſtate is the fund for the payment of all debts, and the mortgage-money is a debt, whether there be a covenant for payment in the mortgage-deed, or not; tho' ſome have been of a contrary opinion. where there is no covenant expreſs or implied. But the perſonal eſtate of the father is 2 Salk. 449. 1 Ch. Ca. 74. 2 Ch. Ca. 5. 1 P. Wms. 291. 2 Salk. 449. 1 Vern. 436. Prec. Ch. 61, 423. 2 Salk. 449, 450.

is not liable to the grandfather's debts, and therefore it ſhall not go in exoneration of the grandfather's mortgage of the lands deſcended to the
* P. 93. * grandſon, unleſs the father had been executor to the grandfather, and converted the aſſets to his own uſe.

1 Vern. 213. *Sect.* 2. So the wife being a jointreſs, and having granted a term for years only out of her eſtate for life, by fine, with her huſband for a mortgage, there reſts a reverſion in her, which naturally attracts the Equity of redemption, altho' the Equity of redemption was limited to the huſband and his heirs by the deed of redemption; for that ſhe was no party to it. And the huſband having covenanted to pay this money, if there be aſſets ſufficient, it ſhall be decreed clear to the wife; for the huſband having had the money, is in Equity the debtor, and the land is to be conſidered but as an additional ſecurity. And ſo it is if there were no expreſs covenant. But all other debts ſhall be firſt paid.

Sect. 3. And as the heir in many caſes has the aſſiſtance and favour of the court, as to make the perſonal eſtate firſt liable to debts, and to be applied in eaſe and exoneration of the real eſtate:
1 Vern. 36. So even an *Hæres factus* has had that relief here.
2 Ch. Ca. 84. The reaſon is, becauſe the *Hæres factus* comes inſtead of the *Hæres natus* by the will, and it is preſumed to be the intention of the teſtator, that he ſhould have all the privileges of the *Hæres natus*. And ſome ſay, that not only he who is *Hæres factus* ſhall pray in aid of the perſonal eſtate to diſcharge the real, but even an ordinary deviſee ſhall have that benefit. But the law ſeems otherwiſe. For if a man mortgages his land, and then
1 Ch. Ca. 271. deviſes it to *J. S.* or to *A.* for life, the remainder in fee to *B.* there the charge doth paſs with ſuch eſtate, for there appears no intent of the teſtator.
1 Vern. 37. Salk. 450. So where the Equity of redemption is purchaſed, the

the purchaſer ſhall have no aid of the perſonal eſtate of the mortgagor, for he has made it his own debt. Nor ſhall the heir himſelf after the ſale; for the Equity that the heir has, is, that the lands may deſcend clear to the family. 1 Eq. Ca. Ab. 270. Prec. Ch. 206.

Sect. 4. But regularly the perſonal eſtate muſt aid the heir, and an implied intent muſt not, without clear expreſſion, alter the equitable general law. As if a man deviſes lands for payment of debts and legacies, and deviſes the perſonal eſtate ſhall go in diſcharge of the real; becauſe the remainder of the lands, after the debts and legacies paid, deſcends to heir as heir, and he is not thereby diſinherited. And altho' there is an expreſs deviſe to the executor, yet that is only after debts and legacies paid, and being no more than the law * gave him, is a void deviſe. A *Fortiori* if the deviſe to the executor be in the ſame clauſe in which ſhe was named executrix; for it not being ſaid, free and exempt from payment of debts, ſhe muſt therefore take it as executrix. Otherwiſe if a man deviſe lands for payment of debts and legacies, and the overplus to the heir, or to the heir and a ſtranger, as they call it in Chancery out and out. For there is a difference between charging an eſtate with payment of debts, and deviſing an eſtate to be ſold out and out to pay debts: Since in this caſe the intent appears to be, that he ſhould take the overplus, as a money-legacy only, and that the land ſhould not deſcend to him as heir at all. 2 Vern. 568. * P. 94. Talb. 209. contra. 2 Vern. 718. Prec. Ch. 451.

Sect. 5. And if there be no aſſets to anſwer the intent of the teſtator on his legacies, the heir ſhall have no aſſiſtance of the perſonal eſtate; for this would be to overthrow his expreſs intent by an implied one, that the land was to deſcend free to the heir, and to take away from a man the diſpoſal of his own property. So if the perſonal eſtate were deviſed to a ſtranger, and not to the executor;

1 Eq. Ca. Ab. 271. tor; for ſuch deviſe muſt then be taken as a legacy. So if the deviſe were of a ſpecifick legacy, or any certain ſum to the executor; for the ſame reaſon. So if he deviſe all his goods, chattels, and houſhold-ſtuff in ſuch an houſe to another, and then goes on in theſe words, *All the Reſt and Reſidue of my Perſonal Eſtate I give and deviſe to my Wife, whom I make ſole Executrix:* For tho' the words, *Reſt and Reſidue of his Perſonal Eſtate*, are generally underſtood, after debts, legacies, and funerals: Yet here they are relative to the laſt antecedent, and paſs to his wife, as a ſpecifick deviſe of what he had not before particularly deviſed. Much more if there be an expreſs clauſe to exempt the perſonal eſtate from payment of debts, the will of the teſtator ſhall be obſerved. And the heir can have no Equity in caſe of other creditors to defeat them of their debts, for this even an expreſs deviſe to him of the perſonal eſtate could not have done.

2 Vern. 182. *Sect.* 6. On the other ſide, it is but reaſonable, that as the heir is to have Equity, he ſhould do it. And therefore altho' regularly, where the parties are in equal degree, the executor or adminiſtrator may prefer which of them he thinks fit: Yet Equality is Equity, and the Court, where they have any foundation to go upon, uſually marſhals the aſſets, ſo as all parties may have ſatisfaction, for *Nemo ex* * P. 95. *alterius detrimento fieri* * *debet locupletior.* So there 2 Vern. 455 be a debt owing to the king, the king's debt ſhall be ſatisfied out of the real eſtate, that the other creditors may be let in to have a ſatisfaction of their debts out of the perſonal aſſets.

Sect. 7. But Equity is remedial only for thoſe who come in upon a good conſideration. So that in caſe of legacies there is a difference. For if the legacy be in ſatisfaction of a debt, or as a proviſion for younger children or grand children, then Equity will marſhal the aſſets, as for a ſimple contract

contract creditor. And the ſtatute for ſettling inteſtates eſtates has made a will for thoſe that die inteſtate and therefore the younger children of one dying inteſtate, ſhall have the ſame advantage, as if their ſhares had been reſpectively deviſed to them. But otherwiſe it is, if the legatees were volunteers or collateral relations, for whom the teſtator was not obliged by the law of nature to provide, or were provided for in the life of the teſtator. And ſince the heir is not diſinherited by the will, the value of what deſcends to him muſt be looked upon as much a deſigned proviſion for him, as an expreſs deviſe is for the younger children, and therefore he muſt abate in proportion out of his proviſion, in the ſame manner, as each of the younger children are to abate out of their reſpective proviſions, where there is not ſufficient to anſwer them all, ſo that the heir muſt have as much as all the legatees taken together. But if there be a bountiful proviſion for the heir; as where there is as much left in reſerve for him, as is taken out for a proviſion for all the younger children legatees; in ſuch caſe the legatees ſhall have their whole legacies.

2 Vern. 310.

2 Salk. 416.

Gower and Marſh,

* C A P. III. * P. 96.

Of Buying in Old Securities to protect a Title.

Sect. 1. *IN æquali Jure melior eſt Conditio Poſſidentis.* Where Equity is equal, the law ſhall prevail, and he that hath only a title in Equity, ſhall not prevail againſt Law and Equity. As a purchaſer or mortgagee coming in upon a valuable conſideration without notice, and purchaſing in a precedent incumbrance, it ſhall protect his eſtate

1 Eq. Ca. Abr. 322. 2 Vent. 337.

againſt any perſon, that hath a mortgage ſubſequent to the firſt and before the laſt mortgage, tho' he purchaſed in the incumbrance, after he had notice, of the ſecond mortgage; for he has both Law and Equity for him. It is true there have been ſtrong arguments uſed againſt the unreaſonableneſs of this practice, and there might likewiſe be ſtrong reaſons brought for the maintaining of it, and ſo it was at firſt a caſe very diſputable: but being long ſince ſettled, the court will not now ſuffer that point to be ſtirred; but it may be, they will where they find a man deſigning a fraud, and who thinks to make a trade of cozening by the rules of the court. So tho' it were purchaſed *pendente lite* between them, for a diſcovery and re-conveyance, the firſt mortgage being ſatisfied. But otherwiſe if after a decree made. So tho' nothing be due upon it; he himſelf has no eſtate at all in him; or it be obtained by undue means, as without any conſideration; or by fraud: For the practice is not material, to ſecure a juſt debt. So if the purchaſe were of a precedent ſtatute by the laſt mortgagee, he ſhall not be brought to any account upon this in Equity by the ſecond mortgagee, any otherwiſe than he may do at Common Law upon a *Scire fac' ad computant'*, *viz.* not according to the true value, but upon the extended value for the whole debt and damages. And this, altho' the extended value was but a third part of the true value. Same Law, of a purchaſer, and their is no difference, whether it was bought in before the purchaſe or after. So that by protecting is meant, making all the advantages of it, that the Law admits of.

1 Vern. 187. 2 P. Wm. 492.

2 Vern. 159, 525. 2 Vern. 187.

1 Ch. Ca. 149.

Sect. 2. So where the ſecond mortgagee agreed with the executor of the conuzee, to put the ſtatute in execution at his coſts, and to pay him the debt due on the ſtatute, after ſuch time as the ſtatute ſhould be extended, and an aſſignment made thereof;

of; for a thing agreed to be done, is looked upon in Equity as really done, and he ſhall not only defend himſelf, * as to the land, that is in his mortgage; but for ſo much as is contained in the ſtatute. But if a man is ſeized of ſixty acres, and mortgages twenty to *B.* and then mortgages the whole to *C.* who purchaſes in the firſt mortgage, that ſhall not protect more than the twenty acres; but it ſhall protect theſe twenty acres, ſo as *B.* ſhall never recover that, until he pay *C.* all the money upon the firſt and laſt mortgage. * P. 97.

Sect. 3. And it is now an eſtabliſhed doctrine, that a purchaſer *bonâ fide*, and without notice of any defect in his title at the time of his purchaſe, may lawfully buy in any ſtatute, mortgage, or any other incumbrance, and if he can defend himſelf by thoſe at law, his adverſary ſhall have no help in Equity to ſet thoſe incumbrances aſide; for Equity will not diſarm a purchaſer. And precedents of this kind are very antient and numerous, where the court has refuſed to give any aſſiſtance againſt the purchaſer, either to the heir or to the widow, the fatherleſs, or to the creditors, or to one purchaſer againſt another. And this rule in Chancery is in vindication of the Common Law, where the maxims which refer to deſcents, diſcontinuances, nonclaims, and collateral warranties, are only the wiſe acts and inventions of the law, to protect and quiet the poſſeſſion, and ſtrengthen the right of the purchaſers. 1 Eq. Ca. Ab 322. Prec. Ch. 249.

*P. 98. # BOOK IV.

PART. I.

CAP. I.

Of Laſt Wills and Teſtaments.

Lynd. 174. Lamb. Sax. Laws, 111. 64. Wilkins 78. Seld. Eadm. 167. 9 Co. 138. Salk. 37.

Sect. 1. IT is not pretended, that wills are of Eccleſiaſtical conuzance *ſuâ naturâ*, but only ſuch as were made for pious uſes; and in *England* it plainly appears, that the probate of teſtaments was originally in the county-court. But the conqueror made a law, that no matters of Eccleſiaſtical conuzance ſhould be tranſacted in the county-court. And altho' it is not diſcovered, how the biſhop and earl divided their cauſes and juriſdiction after the ſaid law: Yet that of wills, it ſeems, went wholly to the biſhop and clergy, and the *Saxon* cuſtom being changed, the *Norman* was introduced. Nor was the very name of the Eccleſiaſtical Court, or Court Chriſtian, heard of before this diviſion. But it is clear, that in *H.* 2d's time, the juriſdiction of perſonal legacies was in the ſecular courts, and in *Glanv. lib.* 7. *cap.* 6 & 7. there is the form of the writ for a perſonal legacy. Yet that the Spiritual Court did from the beginning

of

of *H.* 3. exerciſe a juriſdiction for recovery of legacies, is infallibly proved from *Bracton*, and the caſes of that time. And tho' in legacies, as in tithes, the juriſdiction, that gave the recovery of them, was ſome times in one, and ſometimes in the other Court, before it was reſtrained to the ſpiritual only: Yet it ſeems beyond exception, that the ſpiritual juriſdiction over legacies, was long before in practice. The beginning of this practice is as difficult to find, as that of probates: But it is thought by ſome to have come from the canon in the decretals, *Extr. de Teſt. c.* 6.

Sect. 2. But it is without queſtion, that the ſuit for a perſonal legacy may be brought in Chancery; and if the matter has proceeded to a ſentence in the Eccleſiaſtical Court, it is proper to come here for the executors indemnity. And here legatees are to give ſecurity to refund, but not there; and * this court will ſee the money put out for children. And ſo a bill for diſtribution of an inteſtate's perſonal eſtate is very proper in this court; for the ſpiritual court in that caſe has but a lame juriſdiction, and there are no negative words in the Act of Parliament. 2 Ch. Ca. 85. * P. 99. 2 Vent. 362. 2 Ch Rep. 371. 2 Ch. ca. 95.

Sect. 3. But a will proved in the ſpiritual court, is not to be controverted here for fraud, altho' he ſhall have no aid of this court. Yet ſome think the judgments of the Eccleſiaſtical Court ought to be as ſubject to the Equity of this court, as judgments in the courts of Common Law. And altho' at law one executor is not liable to the *Devaſtavit* of another, yet in the Eccleſiaſtical Courts, and by their law, if an executor prove the will, they will charge him, tho' he intermeddle no further, to pay the legacies. And the plaintiff is without relief by appeal from the ſentence; becauſe the judges delegate muſt judge according to that law, and therefore this court ſhould relieve him. And without queſtion 2 Vern. 8. 76. 2 P. Wms. 286. Cr. El. 318. 2 Vern. 700. Prec. Ch. 123.

queſtion there may be fraud in obtaining a will, which is relievable in Equity, and of which no advantage can be taken at law. As if a man agrees to give the teſtator 2000 *l.* in bank-bills, if he will deviſe his eſtate to him; and upon the delivery of theſe bills, he makes his will, and leaves his eſtate to him accordingly, and the bills after prove to be forged or counterfeit. But it has been ſettled, that a will of a real eſtate cannot be ſet aſide in a court of Equity for fraud or impoſition, but muſt be firſt tried at law, on *deviſtavit vel non*, being matter proper for a jury to inquire into.

1 Eq. Ca. Abr. 406.

Sect. 4. In regard therefore, that caſes of wills are for the moſt part tried in the Eccleſiaſtical Courts, and by the rules of the Civil and Pontifical Law, the king's judges muſt in ſuch caſes judge after the law of the church, that there may be a conformity of laws. And thus in perſonal chattels, the Civil and Canon Law is to be conſidered. And there the rule is, where perſonal chattels are deviſed for a limited time, it ſhall be intended the uſe of them only, and not a deviſe of the things themſelves; and ſo a remainder over of them is good. And altho' in ſome caſes a man is ſaid to die without iſſue, whenever there is a failure of iſſue, as to the limitation over of lands of inheritance: Yet in caſe of a perſonal legacy, or chattel real, it is not intended to ariſe upon any remoter contingency, than that of dying without iſſue living at his death. So where there was a deviſe of all * the perſonal eſtate to *A.* who was a feme covert, but the teſtator declared, that it was his mind, that the intereſt and produce thereof ſhould be for her uſe ſeparate from her huſband, and after her deceaſe, the intereſt and produce thereof to her children till twenty-one, and then the principal to them, but for want of ſuch iſſue, then he gave all his eſtate to the children of *J. S.* and made the ſaid

Cr. El. 387.

2 Vern. 245, 331. 1 P. Wms. 1.

1 Eq. Ca. Ab. 193. 1 P. Wms. 432, 563, 663. 3 P. Wms. 258.

* P. 100.

ſaid *A.* executrix, and reſiduary legatee, ſhe being only intitled to the intereſt and produce for her life, the perſonal eſtate was not veſted in her, and the limitation over upon the contingency of *A.* dying without iſſue, is a good limitation, and as for the words *Reſiduary Legatee*, it only means for the purpoſe in the will.

Sect. 5. And the canoniſts, whom our reſolutions have followed, have expounded theſe wills, as the civilians did the *Teſtamenta militaria*, *viz.* according to the intent. And therefore, altho' a legacy is to be taken as a gift, yet a man ſhall be intended to be juſt before he is kind. So that a bequeſt of the ſame ſum by the debtor to the creditor, ſhall be applied in ſatisfaction of the debt. For by the law of Nature, when two duties happen to interfere at the ſame point of time, that which is the moſt honeſt and beſt is to be preferred. And ſo it ſhall be in conſtruction; for the intendment of Law is agreeable to Nature, and on the better ſide. Yet where there are aſſets, and he intended both, it may be as good Equity to conſtrue him both juſt and kind, and the conſtruction of making a gift a ſatisfaction has in many caſes been carried too far. And this preſumption of the Canon Law was founded upon the ſimilitude of the legacy with the debt, which yet might be controlled by oppoſite preſumption: Much more then ought proofs to do it, which may be ſtronger than any preſumption. So if a legacy be leſs than the debt, it was never held to go in ſatisfaction. So if the legacy were upon condition, or upon a contingency; for the will is intended for his benefit, and therefore it could not be ſuppoſed, that the teſtator would give him an incertain recompence in ſatisfaction of a certain demand. So if the thing were of a different nature, as land, it ſhould not go in ſatisfaction of money, tho' there was a defect of aſſets. So if the

Prec. 68. 394. 138. 3 Eq. Ca. Abr. 203. Salk. 155, 508. 2 Vern. 177. 498. 555. 3 P. Wms. 353. 1 Salk. 155. 2 Vern. 593. 1 P. Wms. 408.

Prec. in Canc. 395. Salk. 508. 2 P. Wms. 553. 3 P. Wms. 225. 2 Vern. 248. 2 P. Wms. 616. 3 P. Wms. 247. Salk. 508.

the debt was contracted after the legacy given, he could not have it in contemplation to ſatisfy a debt not then in being. Caſes of this nature therefore depend upon circumſtances, and where a legacy has been decreed to go in ſatisfaction of a
*P. 101. * debt, it muſt be grounded upon ſome evidence, or at leaſt a ſtrong preſumption, that the teſtator did ſo intend it; for a Court of Equity ought not to hinder a man from diſpoſing of his own, as he pleaſes. And therefore the intention of the party
2 Salk. 508. is to be the rule; for where he ſays he gives a legacy, we cannot contradict him, and ſay he pays a debt.

Sect. 6. But as the whole force of the bequeſt often reſts upon ſome particular words, it will be neceſſary to conſider, what interpretation they bear in the Canon and Civil Law: At leaſt ſuch as are made uſe of frequently in teſtaments, as goods, chattels, moveables, ready money, debts, houſhold-
Swinb. 475. ſtuff, and the like. Now by goods, the Civil Law doth oftentimes underſtand, not only thoſe things whereof a man is owner, or juſtly poſſeſſed: But alſo ſuch as belong to him, whether corporeal or incorporeal, for the which he may have a lawful action, as debts. And ſo with us the words, goods and chattels in a deviſe, will paſs a right to
Swinb. 475. ſet aſide a releaſe obtained by fraud. 2*dly*, Sometimes it is underſtood of a man's whole eſtate, both actively and paſſively, which devolves upon him, who in that law is called *hæres* or heir. 3*dly*, By the word *goods*, the ſame law doth underſtand no more, but only a man's clear goods, his debts deducted. And in the Common Law, the word *goods* extends, neither to things in action, nor chattels, nor freehold.

1 Swin. 475. *Sect.* 7. Chattels is a word more obvious in the laws of this realm, than in the Civil Law, and takes in all his goods; except ſuch as are of the nature

ture of freehold or parcel thereof. And theſe chattels are divided into real or immoveable, and perſonal or moveable. Among the latter, money is accounted, tho' ſome have held that ready money is neither goods nor chattels; becauſe it is of no worth in itſelf, but is made ſo only by the conſent of men, as neceſſary for common life. But according to others, a deviſe of all his chattels, paſſes the whole eſtate of the teſtator, both actively and paſſively, as in caſe of a deviſe of all his goods; for it is as extenſive and more. Swinb. 476

Sect. 8. *Mobilia*, is ſtrictly ſuch goods as are paſſively moveable, or removeable: And *Moventia*, ſuch as actively and by their own accord do move themſelves, as live goods. Yet regularly moveables are indifferently underſtood of both, and will paſs them in a deviſe: As alſo induſtrial fruits, *viz.* ſuch as are ſown by men's induſtry, in order to be reaped with * increaſe ere long, for theſe are moveable *Habitu*, or in the intention and purpoſe of the ſower. And theſe emblements are to be put in the inventory; for the rule of *Acceſſorium ſequitur Principale*, is true in fruits natural, but not in fruits induſtrial. Immoveable goods or chattels real, are thoſe which do not immediately belong to the perſon, but to ſome other thing by way of dependancy; as trees growing, or a term for years. Yet it will not extend to the induſtrial fruits; for they are reckoned among the moveable: But it takes in all leaſes, and all the natural fruits; as alſo whatever is appurtenant to, or parcel of the thing demiſed, which, if it were out of leaſe, ſhould belong to the heir, and not to the executor. Swinb. 476. Swinb. 478. * P. 102.

Sect. 9. Ready money is juſtly reputed among the moveable goods of the deceaſed; for no goods are more moveable, and it is therefore termed current. But altho' this is regularly true, yet it fails in particular caſes. As 1*ſt*, Of the money that ariſes Swinb. 479. 1 Eq. Ca. Abr 201. Prec. Ch. 8.

from lands deviſed to be ſold, *vide* 21 *H.* 8. *cap.* 5. 2*dly*, Of money laid up for payment of lands purchaſed; for it is not likely, that he intended to paſs that money in prejudice of the heir, according to that rule of law, that nothing doth paſs by general words, where it is likely the giver would not grant them by ſpecial. Alſo in favour of the heir, many things, which of their own nature are moveable, by conſtruction or fiction of law are nevertheleſs accounted immoveable, as hawks and hounds, and deer in the park, *&c.*

3winb.481. *Sect.* 10. Debts are neither moveable nor immoveable goods, nor will they paſs as ſuch. But if the teſtator did bequeath all his goods moveable and immoveable whatſoever; theſe univerſal ſigns ſtretch the word, to which they are joined, to the comprehenſion of whatſoever is ſignified by them, not only properly, but alſo improperly, or elſe they would be idle and ſuperfluous, which ſuperfluity is to be avoided, eſpecially in a teſtament, wherein commonly leſs is written than ſpoken, and leſs ſpoken than was meant, partly thro' want of ſkill, and partly thro' want of time. And altho' no man is preſumed to think that which he doth not ſpeak: Yet by the common uſe of ſpeech within this realm, debts are underſtood to be comprehended under that general legacy of all goods moveable and immoveable.

*P. 103 * *Sect.* 11. Houſhold-ſtuff is *Inſtrumentum patris-familias domeſticum & quotidianum.* But this wants ſome further explanation. In the firſt place then, 3winb.484. there is no doubt, but theſe particulars are to be reckoned as part and parcel of houſhold-ſtuff, *viz.* tables, ſtools, chairs, carpets, hangings, beds, bedding, baſons with ewers, candleſticks, all ſorts of veſſels, ſerving for meat and drink, being of earth, wood, glaſs, braſs, or pewter, pots, pans, ſpits, and ſuch like. 2*dly*, Without all difficulty, apparel, books,

books, weapons, tools for artificers, cattle, victuals, corn in the barn, or granary, wains, carts, plough-gear, veſſels affixed to the freehold, are no part of houſhold-ſtuff. And in ancient times, nothing which was made of ſilver or gold, was accounted houſhold-ſtuff; becauſe of the ſeverity and frugality of old times, when veſſels of gold and ſilver were very rare. But upon the change of manners *ex Ebore, teſtitudine atque argento, jam ex auro etiam atque gemmis ſupellectili utimur.* And thus alſo theſe veſſels of ſilver, gold and precious ſtones, as baſon and ewer, bowls, cups, candleſticks, *&c.* paſs as part of houſhold-ſtuff or furniture. Yet not indiſtinctly or abſolutely, but with this limitation, ſo that it be agreeable to the teſtator's meaning, otherwiſe not; that is, if the teſtator, in his life-time, did uſe to reckon them amongſt his houſhold-ſtuff. But if the teſtator did eſteem them as ornaments, rather than utenſils, and did uſe them for pomp or delicacy, rather than for daily or ordinary ſervice of his houſe, in this caſe, they do not paſs under the bequeſt of houſhold-ſtuff. Or if the teſtator did uſe to number things of another kind amongſt his houſhold-ſtuff, which without doubt are not ſo to be eſteemed; as his apparel, and ſuch like; then, altho' he did intend, that his apparel or thoſe things ſhould paſs under the name of houſhold-ſtuff, yet the legatory cannot recover them. So furniture in a large houſe takes in plate; but not where he diſtinguiſhes the chapel plate from the furniture. 1 P. Wms. 425. n Prec. Ch. 207. 2 Vern. 638.

Sect. 12. And altho' there be no defect in the teſtator's meaning, yet becauſe the ſame is no way expreſſed by words, which by their own nature, or by common uſe of ſpeech might teſtify this meaning of the teſtator, therefore is the legacy void, as if it had not been written or ſpoken: Unleſs it were the expreſs will of the teſtator, that the legacy ſhould ſtand good notwithſtanding his miſnaming 3 Swinb. 486.

*P. 104. thereof. * *Non enim ex opinione ſingulorum, ſed ex communi uſu verba exaudiri debent.* But it is to be obſerved, that error in the name, quantity, or quality of the thing bequeathed, doth not hurt the legacy, when the body or ſubſtance is certain; and ſo of error in the name, or quality of the perſon. But error in the body or ſubſtance of the thing bequeathed doth deſtroy the legacy, as well as in the perſon of the executor or legatory. And ſo error in the form of the diſpoſition maketh it to be of no force, as if a condition is omitted by miſtake, the legacy is void.

Archer and Buckham. Hill. 6 Ann. in C. B.

Sect. 13. And a will ſpeaks not until the death of the party, for till then he is maſter of of his own will: But the conſtruction is to be made, as matters ſtood at the time of making the will. As where *A.* deviſed the ſurplus of his eſtate to his brothers *B. C.* and *D.* and the children of his brother *E.* and of his ſiſter *F.* equally to be divided; and if any of my brothers die before the eſtate is got in and divided, his or their ſhare to go to his or their children; *B.* died before the eſtate was got in and divided, and before the teſtator, yet ſtill he died before the eſtate was got in and divided: But then it is objected that his ſhare is to go to his children, when he had no ſhare ever veſted in him, but that is to be underſtood the ſhare intended him. So a deviſe of 300*l.* to three at twenty-one, and if any die, to go to the ſurvivors, one died in the life of the teſtator; this is a deviſe over as an executory deviſe. But where the deviſe was of a debt to two, and if either died, to the ſurvivor, and one died before the debt got in: Altho' he ſurvived the teſtator, yet as he died before the debt was got in, he was not entitled to the ſhare of the debt.

2 Vern. 381. See Prec. Ch. 401.

Sect. 14. And if the gift be general, it ſhall be expounded generally, for the court will not reſtrain the teſtator's bounty. As where one gave legacies of 15*l.* a-piece, to each of his relations of his father

ther and mother's ſide: The Court would not reſtrain the deviſe to the relations, within the ſtatute of diſtributions. So where a will was made in theſe words, *Item*, I give to ſuch of my ſervants, as ſhall be living with me at the time of my death, one year's wages: Altho' ſtewards of Courts, and ſuch who are obliged to ſpend their whole time with their maſter, but may alſo ſerve any other maſter, are not ſervants within the intention of the will; yet the Court will not narrow it to ſuch ſervants only, as lived in the teſtator's houſe, or had diet from him. 2 Vern. 546.

* C A P. II. *P. 105.

How Wills may afterwards be Deſtroyed or Loſt.

Sect. 1. LET us now ſee how a legacy, which was at firſt good, may afterwards be deſtroyed or loſt; and this is, 1*ſt*, By ademption or tranſlation. 2*dly*, Where it is lapſed. 3*dly*, The teſtator's eſtate falling ſhort. Ademption is the taking away of a legacy before bequeathed. Tranſlation is a beſtowing the leagcy bequeathed upon ſome other perſon. So that ademption may be without tranſlation; but tranſlation of a legacy cannot be without ademption. This ademption of legacies is two-fold, expreſſed and implied. The expreſſed is, when the teſtator doth by words take away the legacy before given. An implied ademption is, when the teſtator doth by deed without words, take away the legacy. But ademption of legacies is no more to be preſumed, than the revocation of the teſtament, unleſs it be proved, notwithſtanding the length of time, or alteration of circumſtances; for a revocation by implication muſt be a neceſſary implication, and wholly inconſiſtent. And where it is ſaid, that as the latter teſtament doth deſtroy the former, ſo the latter part of the teſtament doth overthrow Swinb. 522, 526.

throw the former part: That is true, when it is evident that the teſtator did mean it ſhould be ſo. But if it be doubtful, we ought to labour diligently
Swinb. 528. to ſave the teſtament from contradiction. If therefore the ſame thing be deviſed to two, and one dies, the other ſhall have the whole; or if both ſurvive the teſtator, it ſhall be divided betwixt them, or they ſhall take it jointly. But it is ſufficient in laſt wills for the revoking of a legacy, that the teſtator's meaning do appear by an act otherwiſe inſufficient. As if the gift or alienation, not being of neceſſity,
2 Vern. 741. Prec. Ch. 459. 1 P. Wm. 343. but voluntary, be void in Law. Yet the ſecond will muſt be a good will in all circumſtances to revoke a former; it being intended to operate as a will, and not otherwiſe as an inſtrument of revocation.

1 Eq. Ca. Ab. 302 1 Ro. Ab. 614. Moor. 789. Raym. 335. Went. Ex. 64. 2 P Wms. 469 *Sect.* 2. In a deviſe of debts, the true diſtinction ſeems to be between a legacy, *in numeratis*, and a ſpecifick legacy. For in the firſt caſe, the legacy will remain, tho' it is deviſed out of debts paid in to the teſtator: But a ſpecifick legacy may be loſt by being altered. And there is no foundation for the difference taken in the books, between a voluntary and * compulſory payment, for the latter might be with an intent to ſecure the legacy on all events.

* P. 106.

1 Eq. Ca. Ab. 297. *Sect.* 3. And regularly if the legatory die before the legacy be due, the legacy is extinguiſhed: Yet it is otherwiſe, when they take as nominees only, and it is but the execution of a truſt. So when the legacy is not conditional, but modal, as 20*l.* deviſed to a boy to bind him apprentice, and he dies before he is bound, his executor or adminiſtrator ſhall have it; becauſe the ſame is actually deviſed to him, and the act of God ſhall not take it out of him. So if it were deviſed to be paid him within ſix months after he ſhall have ſerved his apprenticeſhip; the ſerving the apprenticeſhip is not a condition annexed to the legacy, but only an appointment when it ſhould be paid. And tho' a will is no deed;

becauſe

becauſe a ſeal is not neceſſary to it; yet it has the force and effect of a deed. And therefore if a perſon ſays in his will, I forgive ſuch a debt, or my executor ſhall not demand it; this is a diſcharge of the debt, tho' the debtor dies in the life of the teſtator. But if a debt is mentioned to be deviſed to the debtor, without words of releaſe or diſcharge of the debt, if the debtor died before the teſtator, that will be a lapſed legacy, and the debt will ſubſiſt. And if the firſt clauſe in the will imports a deviſe only, and the latter clauſe amounts to a releaſe and diſcharge of the debt; the latter clauſe ſhall be coupled with the former, as to be ancillary and dependant upon it, *viz.* if the legacy took effect, then the executor to releaſe, *&c.*

2 Vern. 521, 522. Ibid. 1 P. Wms. 83.

Sect. 4. But a legacy is an immediate duty, tho' payable *in futuro*, and is an intereſt veſted, which ſhall go to the executor or adminiſtrator. So of a ſhare of an inteſtate's eſtate, or a ſum of money deviſed out of lands; for it is looked upon as a legacy and depends merely on the will, and is governed by the Eccleſiaſtical Law, which is ſo. Otherwiſe, where it depends upon a deed; for a truſt is guided by the intent. And if a ſettlement is made, and lands charged with ſuch a ſum of money, as a will, ſhould declare; there the will would be but declarative and not operative. And this the true difference, and not † that which is laid down in ſome books, that where the time is annexed to the legacy itſelf, and not to the payment of it, if the legatee dies before the payment, it is a lapſed legacy: Otherwiſe if the time be * annexed only to the payment of it. So a contingency, as after the death of the firſt deviſee without iſſue living at his death, veſts immediately tho' not aſſignable over; for this is

2 Vern. 342. 2 Ch. Ca. 155. Prec. in Canc. 377.

2 Vern. 417. 2 Vent. 342. 2 Ch. Ca. 155. Salk. 415. 1 Vern. 462. * P. 107. 2 Vern. 673. Prec. Ch. 21. 2 Vern. 758, 766. 1 P. Wms. 566.

† This ſeems to be taken from the words of Lord Keeper *Wright*, 2 Vern. 417. Who calls it a diſtinction without a difference, but is improperly inſerted here, as the diſtinction has been long eſtabliſhed.

is a near and common poſſibility. And where words refer to that which muſt needs happen, there ſhall be no contingency.

2 Vern. 111. Nee. Ch. Rep. 303. 2 Ch. Ca. 25, 171. 1 Vern. 31. 2 Vern. 688 Salk. 416. Prec. Ch. 392. 2 Vern. 111. 1 P. Wms. 540.

Sect. 5. *Laſtly*, If a man deviſes ſpecifick legacies and pecuniary legacies, and the eſtate falls ſhort to anſwer the pecuniary legacies, they ſhall abate in proportion; but nothing ſhall be abated from the ſpecifick legacies. And where one deviſes to his wife all his perſonal eſtate at *W.* this is a ſpecifick legacy, and is as if he had enumerated all the particulars there. So a ſpecifick legatee is not to abate in proportion with other legatees, where there is a deficiency to pay debts: Yet in any caſe, he cannot have more than the teſtator deviſed to him, altho' the teſtator had not power over it. So when the teſtator doth bequeath any thing in ſatisfaction or recompence of ſome injury by him done; this legacy is not to abate any more than a ſpecifick legacy. But if a man deviſes ſpecifick and pecuniary legacies, and afterwards ſays, that ſuch pecuniary legacies ſhould come out of all his perſonal eſtate, or words tantamount; or if there is no other perſonal eſtate than the ſpecifick legacies; they muſt be intended to be ſubject to the pecuniary legacies, otherwiſe he muſt mock the legatees. So a legacy deviſed to be paid in the firſt place, ſhall abate, if the legacies fall ſhort. So a deviſe of 100 *l. per ann.* to be ſet out by his executor, is not a ſpecifick legacy, but *Quantitatis*.

Prec. Ch. 393.

1 Vern. 31. 2 Ch. Ca. 138, 85.

PART. II.

P. 108.

Of Executors and Administrators.

CAP. I.

Of the Probate of Wills.

Sect. 1. BUT we cannot omit making some mention of executors and administrators, at least with respect to their office and duty. Executors and administrators differ in little else than in the manner of their constitution, their offices being almost exactly the same. And this consists chiefly in three things. 1*st*, The proving the will. 2*dly*, The payment of debts. And 3*dly*, The making an account. As to the first; The Ecclesiastical Court is the proper place to try wills and prove them, and the Chancellor will not try them here. But altho' the probate of a testament of personals belongs only to the Spiritual Court: Yet of lands or such things as savour of the realty, it is otherwise; however by agreement they may be proved there. And in boroughs, a devise of lands by custom is reputed as a devise of chattels, and so proved before the ordinary, and after before the mayor in the hustings. So the Prerogative Court of *Canterbury* is not to prove a will concerning the guardianship of a child, which is a thing conusable here, and to be adjudged, whether it be devised pursuant to the

Raym. 405, 6. 1 Sid. 359. 1 Lev. 235. Vaugh. 207. 1 Sho. 293. Hard. 131. 1 Ro Ab. 209. Carth 143. Off. Ex 45. Godol. 58.

Salk. 312. statute. But they may prove a will which contains goods and lands, tho' formerly a prohibition used to go *quoad* the lands, for the spiritual court could not prove the will in part; for the will was the whole will and not a part.

1 Ro. Ab. 911. Rym 481. 1 Salk. 302. Com. 371. Off. Ex. 33. Godol. 144. 5 Co. 97. Co. Lit. 292. 5 Co. 28. 9 Co. 36. 1 Salk 311. Hard. 111. Moor 373.

Sect. 2. But as to executors, probate is not the matter, for he is executor notwithstanding in our Law, and may do all acts, except bringing actions; because else, he cannot appear to the court judicially to be the executor. Yet if he shews it to the court, when he declares, it is sufficient, tho' it was proved after the action brought. And if one executor proves the will, it suffices for all. Neither is the refusal before the ordinary any estoppel to administer afterwards when they please in our Law: And we have no regard in this point to the Ecclesiastical Law, where a renunciation is peremptory. * And if an executor dies, the executor of the executor shall be charged; for he is executor of course, if the will be proved, because there needs no new probate. But no one can prove the will, but he who is named executor in the will, and therefore he must take administration with the will annexed, if the executor died before probate; for administration is an act *in Pais*, of which the spiritual court cannot take judicial notice.

*P. 109.

1 Rol. Ab. 907. Dyer 372. Salk. 305. 308.

Salk. 36, 299. 1 Show. 293 Carth. 457.

Sect. 3. And if a man makes his will, which is proved, the ordinary cannot change it, nor make another executor or administrator; because this was the testator's act, and he hath his authority immediately from the testator, and is like the *Hæres* in the Civil Law, only he is to take nothing to his own use. Nor hath the ordinary any power to grant administration, but when the person deceased did die intestate, or that the executors, either will not or cannot perform the office. For the executor is constituted by the testator himself, and by him thought fit, and the ordinary cannot adjudge him

him not to be so upon a disability by the Canon Law, as where he became a bankrupt; for that is not received here, but as far as admitted from time immemorial. Otherwise of a natural disability, as *Non compos, &c.* And if an executor takes administration, and be once sworn, tho' he will not after administer, the ordinary cannot make any other: But it shall be accounted the testator's folly to make such an one executor as will not administer. And after an executor has once administered, he cannot refuse; or else an executor might convert the goods to his own use, and then refuse, so that a man should never recover against him, which would be against reason: Wherefore the ordinary ought in such case to compel him to prove the testament upon pain of excommunication, *&c.* Godol. 85. Salk. 36. 1 Vent. 335 Godol. 141. 2 Jones 72. 2 Mod. 146. 1 Vent. 303. 2 Lev. 182. Godolp. 58, 59.

Sect. 4. For the ordinary may make process against executors to prove their testament, and if they do not come, they shall be excommunicated; and if they come and refuse, the ordinary ought in all that he can to perform the will of the deceased. And if any legacy be left him, he shall not reap the benefit of it, if being duly admonished, he refuse the burthen. But the executors may pray time to advise, and the ordinary is to grant in the mean time letters *ad colligend'*. So the ordinary may grant administration in the mean time, till the executors prove the will; as during * absence beyond sea, minority, or *pendente lite*, and a *Caveat* is only *Consilium*, but not *Præceptum*. And an administrator *durante minori ætate*, may do all things that an executor may, and he has more than the custody, for he has the property. Yet his release is not good, but for such things as he ought to release, and he is only a curator in the Civil Law, which is in the nature of a bailiff in our law, who hath no power over the estate, but only to sell *bona peritura*: And the Court *ex Officio* ought to take notice of the

*P. 110. 5 Co. 9. 1 Sid. 185. 1 Keb. 682 Bac. Abr. Law. 415. 1 Rol. Rep 191. Cr. Jac. 463 2 Ro. Rep. 6. 1 Lev. 186. 2 P. Wms. 576 5 Co. 29. Co. 67. b. Cr. El. 717. 2 And 132. 1 Ro. Ab. 910. Skin. 156.

Eccleſiaſtical Law, when it is by that Law determined.

Sect. 5. But when one dies inteſtate, the ordinary has power to grant the adminiſtration to whom he pleaſes. And therefore the ordinary may well make another, if the committee will not adminiſter at all, or but in part; for he cannot compel one to adminiſter, and then is the power of the firſt determined, as a man may revoke his letter of attorney. For as a former Will may be revoked by a latter one, by the law of the church, *a fortiori*, ſo may letters of adminiſtration. And a power or authority is revocable, as an adminiſtration; becauſe he has nothing to his own uſe; Otherwiſe of an intereſt certain. But meſne acts executed ſhall ſtand, *viz.* if the adminiſtration, was once lawfully granted, tho' not perhaps, where it was never good. Yet even in the firſt caſe, they may be avoided againſt creditors for covin, by the ſtatute of 13 *Eliz.* And if an adminiſtrator dies, his executors cannot meddle with his goods, but the ordinary may make a new letter to whom he will, *&c.* And upon letters of adminiſtration ſhewn, we muſt judge according to their Law; for it ſhall be intended, that they would not grant it againſt Law. But altho' by the Civil Law, the adminiſtrator was accountable as ſervant to the ordinary, and might be diſcharged by him, and a repeal might have been of the letters of adminiſtration at the ordinary's pleaſure: Yet ſince the ſtatute 21 *H.* 8. *cap.* 5. the adminiſtration being duly committed by the ordinary, cannot now be repealed without cauſe, but a prohibition lies. So where at Common Law, the ordinary was not compellable to grant adminiſtration at all, and alſo might grant it to whom they pleaſed; now they are compellable to grant it to the next of kin. Nor is adminiſtration now eſteemed like a letter of attorney, but is rather an office, and

6 Co: 18.b. Cr.El. 459. Mŏor 396.

Swinb. 396 1 Rol. Ab. 907.

1 Sid. 280, 293. 379. 1 Lev. 157. 186. 2 Lev. 55. 1 Vent. 217. Latch 67.

2 Vern. 514.

and adminiſtrators are enabled to bring actions in their own name, and come in the place of executors, * as a new creature made by the ſtatute, and therefore this office ſurvives. *P. 111.

Sect. 6. And the Civil Law with reſpect to ſucceſſions, was anciently very various and perplexed, till by *The Novel Conſtitutions* 118. *c.* 1. it was ſettled and made plain; from whence the plan of the ſtatute of diſtributions was taken and penned by a Civilian, and except in ſome few particular inſtances mentioned in the ſtatute, is to be governed and conſtrued by the rules of the Civil Law, and not from the Canon Law. For the Canon Law prohibiting marriage between relations, till after the fourth degree, that they might exclude as many as poſſible from the liberty of marriage within thoſe degrees without a diſpenſation, reckon all in the direct aſcending or deſcending lines, and thoſe in the collateral line correſponding with them, to be but one degree. And it is ſaid, the Eccleſiaſtical Court very anciently made diſtribution of Inteſtates Eſtates, long before the Act of Parliament, *viz.* of 22 *Car.* 2. nor were they prohibited till the reign of king *James* 1. And the prohibition was grounded on the ſtatute of 21 *H.* 8. which directs the ordinary to grant adminiſtration to the next of kin; for when that was done, they had executed their authority. But where the words in the Act of Parliament are, *to diſtribute according to the Laws for that Purpoſe, and Rules in the Act aforementioned*; the word *Laws* muſt relate and be intended of Eccleſiaſtical Laws, and the uſage in the ſpiritual Court before the time practiſed. And there is no doubt now, that the half-blood ſhall have adminiſtration; even an alien of the half-blood is capable. As to the words in the act, provided that no repreſentation be admitted amongſt collaterals after brothers and ſiſters children, theſe are to be underſtood Prec. Ch. 592, 593.

1 Salk. 250.

ſtood of the brothers and ſiſters of the inteſtate. For the inteſtate is the ſubject of the act, it is his eſtate, his wife, his children: And by the ſame reaſon his brother's children, he being plainly the cor-relative to all. But the ſtatute being made upon a preſumption, that the inteſtate intended to prefer the next of kin, when there is a reſiduary legatee, that preſumption is taken away: And therefore he ſhall have the adminiſtration, whether aſſets or not.

*P. 112. * CAP. II.

Of Payment of Debts.

Sect. 1. BUT executors ſhall have only ſuch chattels as the teſtator had to his own uſe. And regularly eſtates of inheritants, or of freehold deſcendible, ſhall go to the heir, and the ſtatute of 29 *Car.* 2. *cap.* 3. makes the eſtate *pur auter vie* aſſets, only to pay creditors, for it is ſtill a freehold and not diſtributable. Yet whatever comes to the executors hands, or they are entruſted with as executors, ſhall be aſſets at Law. And legal aſſets, altho' you cannot come at them without the aſſiſtance of Equity, ſhall be applied in a courſe of adminiſtration: Otherwiſe where you raiſe aſſets, where there were none at Law. Yet even there, real ſecurities ſhall be firſt ſatisfied, and then the debts by bond and ſimple contract, to be paid in average; for any other method would become impracticable. And the rule is, where there are legal, and alſo equitable aſſets, the creditors, who will take their ſatisfaction out of the legal aſſets, ſhall have no benefit of the equitable aſſets, till the other creditors, who can only be paid out of thoſe aſ-

2 Vern. 435.

ſets

ſets have received out of them an equal proportion of their reſpective debts. And where-ever the teſtator's intent appears, the lands ſhall be liable without expreſs words to the payment of his debts; So far as creditors favoured, and if the profits will not raiſe the ſum in a convenient time, they may ſell. Eq Ca.Abr. 197. 1 Vern. 456. 2 Vent. 357.

Sect. 2. The courſe and order of payment of debts by an executor at Law, is 1*ſt*, Debts to the king upon record. 2*dly*, Judgments obtained in a courſe of juſtice in adverſary ſuits againſt the teſtator, altho' by mere confeſſion and without defence in any Court of Record, and of two judgments, he who firſt ſues execution muſt be preferred; but before, it is at the election of the executor to pay which he will firſt, only a judgment in a foreign country, as *France*, is to be conſidered but as a ſimple contract. And a decree in this Court is equal to a judgment at Law. But if the decree paſſed by default, he may conteſt the reality of the debt, as at Law in an eſcape, the gaoler ſhall have the priſoner's Equity. 3*dly*, Statutes or recognizances, and of theſe whoever firſt getteth hold of the goods in execution ſhall be preferred: But before, the executor may give precedence to which he will. But neither of theſe before they are broken do * take place of ſpecialties. 4*thly*, Specialties by bond or bill, and of ſuch ſpecialties that is to be preferred, whoſe time of payment is already come, eſpecially if it be demanded. But in equal degree, he may pay himſelf firſt, and any ſtranger notwithſtanding a verbal demand, if no ſuit be commenced, and if ſeveral ſuits are commenced, he who firſt hath judgment muſt be firſt ſatisfied. But between a debt by obligation, and a debt for rent or damages upon a covenant broken, there ſeems to be no difference; that is a rent behind at the time of the teſtators death. And if the teſtator died a few days before the 2 Inſt. 32. Off. Ex. 132. Cro. El. 793. Off. Exrs. 135. 1 Ro. Ab. 926 Cro. El. 793. 2 Vern. 540. 1 Vern. 143. 3 Lev. 355. 2 Vern. 37, 88, 89. Off. Ex. 138. Dyer. 80. 1 Rol. Abr. 925. Bridg. 79, 80. 5 Co. 28. Cr. Ja. 8. * P. 113. 1 Rol. Abr. 925. Cr. Car. 362 Off. Ex. 41, 141. 1 Ro. Abr. 922. 3. Hol. 127. 520. Grod. 217. Ci. El. 115. 120. 1 Leon. 111. Moor. 260. Dyer. 2. Keilw. 63. 1 And. 24. Winch. 70. 1 Mod. 208 2 Show. 403 1 Vern. 490.

the rent became due, it would not make it the executor's debt, for the rent iſſues from the profits. But if the leſſor diſtrain for the rent arrear, the executor cannot plead fully adminiſtered, as if debt had been brought. Nor can the diſtreſs be taken after in execution upon a judgment or ſtatute of the teſtator's, altho' replevied; becauſe it is bnt in the caſe of a priſoner bailed, who is ſtill in ſome ſort in cuſtody of the Law. Alſo the land is chargeable with the diſtreſs from the very making of the leaſe, and the rent is a debt of a real nature, and ſo ſuperior to perſonal debts. And they were found levant and couchant upon the lands; ſo that if they had been an under-tenant's or ſtranger's cattle, they might have been diſtrained. *Laſtly*, Aſſumptions or promiſes before legacies, or the reaſonable part of the wife or children, to which by cuſtom in ſome counties they are entitled; for it concerns the ſoul of the teſtator to have all duties and debts to others, *æs alienum*, ſatisfied before voluntary gifts or bequeſts. And legacies are gratuities and no duties, and therefore an action will not lie at Common Law for the recovery of a legacy. But legacies ſhall be paid notwithſtanding any covenant not actually broken; for a covenant is no duty till it is broken, and it ſhall be preſumed it will not. Now what is ſaid of the right method or order of payment of debts, diſcovereth how and by what means an executor may waſte them, and ſo much he hath ſtill in right according to the rule *pro poſſeſſore habetur qui Dolo vel Injuria deſiit poſſidere*, and therefore he has ſtill the ſame advantage of preferring which creditor he will, in equal degree, as aforeſaid. But if there be no particular motives from the nature of the debts or legacies, or the circumſtances of the parties, *in Foro Conſcientiæ* he ought to pay every one in proportion, and let the loſs be equal. And ſo was the Civil Law, and the ancient Law

Off. Exrs. 145. 1 Ro. Ab. 927. 3 Lev. 207. 4 Mod. 44. 2 Vent. 184.

Off. Exrs. 155.

1 Rol. Ab. 928.

of

of this realm, *excepto Domini* * *Regis privilegio fiat ubique Defalcatio*, and by the Law of God they ſhall be bound to do what is moſt profitable for the ſoul of the teſtator. * P. 114.

Sect. 3. But the executor may retard one action, and confeſs judgment to another ſubſequent action, and in ſome caſes is obliged to confeſs judgment for his own defence, and plead ſuch judgment to other actions then depending: Otherwiſe if ſeveral actions ſhould come to be tried at the ſame time he might be doubly charged, and obliged to anſwer the value of the aſſets twice over. But a voluntary payment made after an original filed, or bill exhibited, ſhall not be allowed. Yet even in the caſe of a voluntary payment, if the ſuit at Law be not by original, but for the purpoſe upon a *Latitat* out of the King's Bench, there a voluntary payment ſhall ſtand good, tho' after the action brought; for the *Latitat* ſuppoſing a treſpaſs gives no notice of a debt, and ſo of a *Subpœna* out of the Exchequer. *Laſtly*, The bringing of a bill in Equity is not ſtronger, nor can bind the aſſets more than the bringing of an original at Law, and therefore a judgment confeſſed by the executor to a bond creditor after the bill brought in this Court by the plaintiff, who was alſo a bond-creditor, ſhall be allowed upon account. But a judgment confeſſed by an executor pending a bill here, ſhall not be allowed upon an account of aſſets. 2 Vern. 299, 300. 1 Vern. 457.

Sect. 4. And it is the duty of an executor to pay the teſtator's debts, therefore if he pays them with his own money, &c. the teſtator becomes indebted to him in the like ſum. For it is but reaſonable, when a man pays money lawfully, that he ſhould be paid again, and becauſe the ſame hand is to pay and receive, ſo that he cannot have an action againſt himſelf for the debt, therefore he may retain ſo much of teſtator's goods, and pay himſelf. So if he

redeems a pledge of the teſtator's for the full value, the property is immediately changed by the redemption, and it is not aſſets in his hands; for this ſeems a ſort of ſelling it to himſelf. But otherwiſe, if for leſs than the value; the ſurplus is aſſets in his hands. So if a ſpecifick legacy, as three gowns, *&c.* is deviſed, and the legatee takes money in ſatisfaction of them; this amounts firſt to a conſent of the executor to the legacy, and then it is at the ſame inſtant a ſale by the legatee to the executor for the money.

2 Bac. Abr. Law, 435.

*P. 115.

* C A P. III.

Of Making an Account.

Sect. 1. BUT all equal laws of every well governed common wealth, have favoured the execution of Teſtaments and laſt Wills of men deceaſed, and have taken ſpecial care that they ſhould not be fruſtrated. And ſurely if it be agreeable to reaſon, that ſtewards, receivers, bailiffs, guardians, factors, and ſuch as have to deal for other perſons, ſhould be accountable of their ſeveral offices, with greater reaſon may it be maintained, that an executor ought to be ſubject to account. For they for the moſt part have to deal for ſuch as are living, who may have an eye to what they do: But an executor is intruſted for a dead perſon, who is totally ignorant of it, if his executor deal unjuſtly. Beſides from the care and caution that is taken, as well by the Civil as the Eccleſiaſtical Law, in making inventories, we may learn the neceſſity of making of an account; for if executors were not accountable, the uſe of inventories were to little purpoſe. The end for which this account

Swinb. 441.

Godol. 150. Swinb. 401.

Swinb. 445.

is required, is that the will may be fully accompliſhed, and therefore all that have intereſt, are to be cited to be preſent at the making of it, as the creditors and legatees, otherwiſe the account ſhall not be prejudicial to them.

Sect. 2. And if we reſpect what is to be performed by the executor, who maketh the account, he is not only to declare what goods and chattels belong to the teſtator, he hath received, and what debts and legacies he hath paid for the teſtator, and to make due proof of every payment, that is to ſay of leſſer ſums by his oath, and of greater ſums by other proofs, ſuch as the ordinary ſhall allow of; but alſo if any thing do remain of the ſaid goods and chattels, the funerals together with the debts and legacies being ſatisfied and diſcharged, the ſame ought to be employed and diſpoſed of *in pios Uſes.* Swinb. 443. Neither ought the executor by the Eccleſiaſtical Law to apply any part thereof to his own private uſe more than is given him by the teſtator, or which the ordinary ſhall allow him for his labour, or for the like conſideration, *viz.* honeſt, moderate, and not ſumptuous expences, according to the condition of the perſon. Swinb. 444. And for ſtrictneſs no funeral charges are allowed againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearers fees, but not * for pall or ornaments. Salk. 296. But by the Common Law, altho' an executor was compellable to account before the ordinary, and ſo was an adminiſtrator: Yet the ordinary was to take the account as given in, and could not oblige them to prove the *Items* of it, nor ſwear the truth of them. So it was if a creditor ſued in the Eccleſiaſtical Court; for he had a proper remedy at Common Law. But otherwiſe, if a legatee had ſued for an account, or the next of kin who is a legatee by the ſtatute of 22 *Car.* 2. of diſtribution, for the legatee had no other remedy. Yet in ſuch caſe,

* P. 116.

if the executor would pay him, he could not ſue further, for he had right done him, and the executor was not liable, but of neceſſity that right might be done.

Sect. 3. An executor *de ſon tort* is, where a ſtranger aſſumes the office of an executor, by performing ſome acts which are proper to an executor, as by paying himſelf or other creditors with the goods of the deceaſed, or by taking them into his poſſeſſion; for he muſt not be his own carver, becauſe of the great inconvenience and confuſion that would enſue, if every creditor ſhould ſtrive to ſatisfy himſelf firſt. And he cannot take advantage of his own wrong, as to retain for his debt: But all lawful acts that a wrong doer does are good. Yet regularly it cannot be ſaid adminiſtration, unleſs he does what an adminiſtrator ought to do; as by employing them for the teſtator's uſe, for the good of his ſoul. And where there is another executor of right, who proves the will, they will not make him executor of his own wrong by conſtruction of Law. But if he claims in ſuch caſe to be executor, there, becauſe of ſuch expreſs adminiſtering as executor, he may be charged as executor of his own wrong, tho' there be another executor of right: And ſo if he intermeddled before probate. In caſe of inteſtacy, there is this diverſity taken, if *H.* gets goods of an inteſtate into his hands after adminiſtration is actually granted, it does not make him executor of his wrong. But if he gets the goods into his hands before, tho' adminiſtration be granted afterwards, yet he remains chargeable, as a wrongful executor: Unleſs he delivers the goods over to the adminiſtrator before the action brought, and then he may plead *plene Adminiſtravit*, and if he takes upon him to act as executor, he is chargeable at all events.

Swinb. 321, 448. and the Caſes there cited. Off. Ex. 171 Godolp 90. 5 Co. 33 b. Dyer 105, 157. 1 Ro. Ab. 918. Hob. 49. 5 Co. 30. Cr. El. 630. Yelv. 137 Off. Ex. 179 5 Co 33 b. 34 a. Salk. 313.

BOOK

*BOOK V. *P. 117.

CAP. I.

Of Damages and Intereſt.

Sect. 1. SINCE a man is bound in Equity, not only to perform his engagements, but alſo to repair all the damages that accrue naturally from the breach of them: We ought not to omit treating of theſe, and eſpecially of intereſt, which is the moſt frequent of all, it being the common meaſure, where the contract is for money, tho' in its own nature more incertain than any other. But it is now fixed to a certain portion of the ſum lent. For to cut off the infinite variety of liquidations, and law-ſuits, which might be occaſioned by the non-payment of money, it was abſolutely neceſſary to ſettle by a law an uniform reparation for all the ſorts of damages ariſing thence. But there was beſides a natural reaſon which made this regulation as equitable as it was uſeful to the publick. For the damages which proceed from other cauſes do all ſpring from ſome engagement which points out the

the nature of the loſs if he fails to perform it, and determines preciſely the quality of the reparation to be made. But in the caſe of thoſe who owe money, it is otherwiſe. And debtors being all obliged to one and the ſame thing, the reſpective damages which the creditors may ſuffer are accidents they could not foreſee, nor are obliged to anſwer; ſo that they are all bound only to the ſame reparation of damages, and this could not be made more juſt or more certain, than by fixing it at the value of the common profits, that may be made of money by a lawful commerce. As for damages in general, the meaſure of them is to be taken from the quality of the action, the cauſe, and the event. For where there is any fraud or knaviſh dealing, the ſentence ought to have the utmoſt extent that the rigour of the law can give it; becauſe the knavery implies a will and intention to do all the hurt that was poſſible. But where there was nothing unfair, we ought to diſtinguiſh the events enſuing from the fact, which are to be imputed to him as author of it, and ſuch as flow * from other cauſes; for the general rule is, that no man is to be anſwerable for accidents, except there be ſome fault on their part.

* P. 118.

Sect. 2. Now while the *Roman* commonwealth ſtood, no intereſt could be demanded for the debtor's delay of payment, unleſs ſome advance was agreed upon by contract. But ſome lawyers having introduced a cuſtom chiefly in matters of companies, the emperors enlarged it to all contracts *bonæ fidei*, without exception, as alſo to legacies and truſts. Yet in contracts of rigorous right, there muſt always be an agreement in form, or nothing is due, tho' a proceſs be entered. And thus it is plain, that intereſt was not eſteemed by them as any natural produce, but given only in certain caſes to recompence the delay of payment: Yet it

ſeems

ſeems *vicem fructuum ſuſtinere*, and is allowed in Chancery, not only upon a note payable upon demand, but even for demands due by covenant, notwithſtanding the objection that they were not liquidated, and found only in damages. However a difference has been taken in caſe of goods ſold and delivered between bare notes and penal ſecurities; becauſe in the former, the parties have not extended the bargain beyond the bare ſum in the note. But in the latter, altho' there was a profit in the ſale, yet the Court will not diſpoſſeſs him of the ſecurity without a common amends, *i. e.* the common intereſt for the time of his forbearance; for the penalty is preſumed, without any agreement for that purpoſe, to be inſerted for that end. But where exceſſive rates are allowed for the work, in reſpect of ſlow payments, there ſhall be no intereſt allowed; for intereſt is only allowed to ſupply the want of prompt payment. And when-ever the debt is carried beyond the penalty of the ſecurity, it is always for a defendant, upon the maxim, That he who will have Equity muſt do it; as where the party has been delayed by injunction of this Court, or the like. But never for a plaintiff any further than he could charge him at Law; becauſe he has choſen his own ſecurity, and therefore muſt abide by it. Beſides, a man can have no more than his debt, and the penalty is the utmoſt of the debt. Nor will Equity ever carry intereſt beyond the penalty, where there has been no demand of ſeveral years. But where a bond is only a collateral ſecurity, intereſt may be carried beyond the penalty. And ſo where advantage is made of the money, intereſt ſhall be carried beyond the principal.

1 Eq. Ca. Abr. 288.
1 Vern. 350.
Show. Par. Caſes, 15.
1 Vern. 342.
2 Vern. 509.

* *Sect.* 3. As to the time when the intereſt ſhall commence, it ſeems regularly to begin from the delay of payment. In the Civil Law, if that which is due proceeds from a cauſe, which in its own nature

*P. 119.

ture produces no revenue, the intereſt of it will be due only after the debt has been demanded in a Court of Juſtice. But thoſe who retain money in their hands, and convert it to their own uſe, without the conſent of the owners, are bound to pay intereſt, altho' it be not demanded, as a puniſhment for their knaviſh dealing. And in our Law, if the legatee be of full age, he ſhall have intereſt only from the time of his demand after the year; for no time of payment being appointed, it is not payable but upon demand. But in the caſe of an infant it is otherwiſe; becauſe no laches can be imputed to him: And the Law diſpenſes with the demand in his favour, becauſe of the impotence and weakneſs of his age. But where a certain legacy is left payable at a certain day, it muſt be paid with intereſt from the day; becauſe it is the will of the teſtator that the executor ſhould then tender it. Yet ſome think even in that caſe, a legacy ought to carry intereſt but from the time of a demand made, tho' it is otherwiſe of a debt. But a preſent legacy charged upon a reverſion, expectant upon an eſtate for life ſhall carry intereſt from the death of the teſtator. And a demand would be fruitleſs, the legacy not being in the hands of the executor, but only charged on the reverſion. But intereſt may ſometimes commence even before the time of payment. As if a father limits or deviſes portions to his daughters, or younger children, to be paid or payable at their reſpective ages of twenty-one years, or any other certain time, without making any other proviſion for their maintenance in the mean time, and dies; in this caſe they ſhall have intereſt for their portions from his death, till paid; becauſe the father, if he he had lived, was obliged by the Laws of God and nature to have provided for them. Otherwiſe in caſe of ſuch a proviſion by a ſtranger, who was under no ſuch obligation; becauſe it was a mere bounty

Salk. 415. 1 Vern. 251, 262. But ſee 2d. P. Wms 26.

Ibid. Salk. 415.

1 Vern. 262. Salk. 415, 416.

1 Eq. Ca. Ab 286. Prec. Ch. 161

See 2d P. Wms 26 & 27.

1 Eq. Ca. Ab. 301. Prec. Ch. 337 2 P. Wms. 23.

bounty in him, and therefore ſhall be carried no further than he has appointed it.

Sect. 4. And it has generally been laid down as a rule, both in the Civil Law and in Chancery, that intereſt ſhould not be allowed upon intereſt. But this has ſome exceptions. And 1*ſt*, A mortgagee of mortgage forfeited ſhall have intereſt * for his intereſt. At leaſt as to ſo much intereſt as was reſerved in the body of the mortgage-deed, that ſhall be reckoned principal; for it being aſcertained by the deed, an action of debt will lie for it, and therefore it is but reaſonable, that there ſhould be damages given for the non-payment of that money. And altho' it is objected, that if this were to be eſtabliſhed for a rule, every ſcrivener would reſerve all his intereſt half-yearly, from time to time, as long as the money ſhould be continued out upon the ſecurity, which would make all mortgagees pay intereſt upon intereſt: Yet it is certain, there is a clear diſtinction between debt and damages, and it does not appear that any inconvenience will ariſe from this doctrine, it will only ſerve to quicken men to pay their juſt debts. But where there was a deed to let the mortgagee into poſſeſſion and enlarge the time of the redemption, in which deed was mentioned what was due for principal and intereſt; the intereſt then due ſhall not carry intereſt, there being no expreſs agreement that ſuch intereſt ſhould carry intereſt, and the whole ſum due being mentioned for another purpoſe. 2*dly*, It is without all queſtion, that this rule does not extend to a third perſon who pays intereſt for a debtor to his creditor; for the ſame with reſpect to him is a principal ſum lent. And therefore it has always been the rule in Chancery, that the mortgagee aſſigning, the aſſignee ſhould have intereſt for the intereſt then due, and ſo all money really paid by the aſſignee that was due to the mortgagee, ſhall be principal

1 Ch. Ca. 258. * P. 120.

1 Ch. Ca. 67. 2 Vern. 538. 1 Vern. 160. 2 Vent. 135.

to the aſſignee. But the account between the mortgagee and aſſignee, is not to conclude the mortgagor, but the maſter is to ſee what was really due at the time of aſſignment, and whether he actually paid the money; for, if the aſſignment was colourable, it would be otherwiſe. And therefore ſome have thought that intereſt ſhould not be made principal in ſuch caſe, unleſs the mortgagor had joined in the aſſignment. 3*dly*, A ſtated account ought to carry intereſt, eſpecially in caſes of mortgages, and more ſtrongly when ſettled by a maſter of the court purſuant to order, and ſo intereſt ſhall be decreed for the yearly ballance of a renewing account.

Sect. 5. But it is ſaid, that damages are in the
2 Vern. 523. power of the court. And therefore they uſually order them as they ſee convenient. As if lands are limited upon failure of iſſue male, to the daugh-
* P. 121. ters of the marriage and their heirs, until * the next remainder-man ſhould pay them 3000 *l.* there being four daughters only, who entered, the rents in this caſe ſhall not be applied, firſt to pay the intereſt and then to ſink the principal, as in caſe of a common mortgage, but with this variation, that the principal ſhall not be ſunk till a third part is raiſed above the intereſt, and ſo again, when another third part is raiſed. So an account ought to be taken with an annual reſt, each year's account to carry intereſt, in caſes where it is of a truſtee, who has paid off incumbrances with his own money, arrears of annuities, and old mortgages. On the other ſide, where the caſe is very hard, as the principal ſums paid for maintenance of younger children to the grandmother, being allowed in the Houſe of Lords towards the ſinking of her jointure; the court here would not let them be applied at the time when they were paid, but in one entire ſum at the end of the account, and ſo ſtruck off all the intereſt for above ſixteen years, which came to more than the principal.

principal. So where by marriage-articles, the ladies father was to pay several sums at several times for discharging the husband's incumbrances, he advances money to the son-in-law, and maintains the wife and child for two years; such money allowed for maintenance shall be added to the foot of the account, and not carry interest.

Sect. 6. As to the measure of the computation of the interest, it is to be observed. 1*st*, That contracts are to be adjudged according to the law of the place, where such contracts are made, and therefore in all cases, interest must be paid according to the law of the country where the debt was contracted, and not according to that where the debt is sued for. So where one living in *England* devises a rent-charge out of his estate in *Ireland*, it shall be reckoned according to the *English* value, the will being made here. So *Turkish* and *India* interest is allowed upon contracts made there, tho' both parties have been long in *England*. Yet it is but reasonable, where the money is to be paid here, that the party should have an allowance for the return of it. 2*dly*, The statute in 1660 respects only subsequent contracts. So that if a mortgagor before the statute continues paying interest above 6*l. per Cent.* no *Indebitatus Assumpsit* will lie at law for the overplus. Nor is there any just grounds to decree it in Equity, it being voluntarily paid, and the contract not being * changed or varied. But if the mortgagee enters, he shall be allowed interest but after the reduced rate of 6*l. per Cent.* And so it is agreed, that the statute of 12 *Annæ, cap.* 16. which reduces the interest of money to 5*l. per Cent.* has no retrospect, but interest shall be paid, as it was at the time of the contract.

1 Eq. Ca. Ab. 289. 2 P. Wms. 89.

1 P. Wms. 396.

2 Vern. 42, 78, 145.

*P. 122.

1 Eq. Ca. Abr. 288.

BOOK VI.

Of Evidence.

CAP. I.

Of Witneſſes and Proofs.

Sect. 1. BUT as it is not ſufficient to have a right in Equity, unleſs we can make this appear by ſome outward proof to the court, in order to obtain relief: We muſt of neceſſity treat alſo of the qualification of witneſſes, and the nature of evidence, leaſt our diſcourſe ſhould ſeem maimed and imperfect. But we do not here intend to ſpeak of theſe in general, but ſo far as they are uſed in this court. Now in determining the qualifications of witneſſes, Equity follows the Law; and it ſeems the Chancellor cannot do otherwiſe. And therefore if a man be rendered infamous in law; as by an infamous judgment, or has not diſcretion and underſtanding, *&c.* his teſtimony is not to be admitted. And the caſes where the party is concerned in intereſt, tho' never ſo ſmall, have uſually prevailed, unleſs in ſpecial inſtances. As 1*ſt*, For the neceſſity, where no other evidence could poſſibly be had; as where a man tears a note, or a goldſmith's apprentice over-pays a bill of exchange. 2*dly*, *In Odium Spoliatoris*, the oath of a party injured ſhall be a good charge on him who did the wrong.

2 Hawk. P. C. 432.

2 Vern. 317, 463.

Co. Litt. 6.

1 Vern 207, 303

wrong. 3*dly*, After great length of time; as in an account of twenty years ſtanding, he may prove by oath what he cannot prove otherwiſe. 4*thly*, Of ſmall ſums in an account; as under 40*s.* he ſhall be diſcharged by his oath, but he ſhall not charge another ſo. And this rule extends no further than for the ſum of 100*l.* and he muſt mention to whom paid, for what, and when; for in an account he muſt prove the particulars. 5*thly*, Where he has releaſed his intereſt, tho' the releaſe was ſealed in court while the cauſe was trying. 6*thly*, *Particeps criminis* is admitted * to prove matters of fraud, eſpecially where what he proves is to his own prejudice. 7*thly*, If one be made a defendant by covin to take away his teſtimony, and it appears upon the evidence, the judges may and ought to allow him to be a witneſs. And this cannot be a general rule, but every caſe ſtands on its own circumſtances, that is, whether their intereſt is ſo great as it may be preſumed to make them partial, or not; and therefore alms-people and ſervants are good witneſſes. So it is uſual for a legatee of a ſmall legacy, as 5*s.* to a private perſon, or 5*l.* to a nobleman, to be admitted a witneſs for the will.

1 Ch. Rep. 146.
1 Vern. 283, 470.
1 Sid. 315.
2 Jones 116
2 Lev. 236.
* P. 123.
1 Eq. Ca. Ab. 225.
2 Ch. Ca. 214.
1 Vern. 230.
2 Lev. 231.
1 Vern. 254.

Sect. 2. As to the evidence, the uſual courſe in Chancery is by depoſitions, for no witneſſes *viva Voce* are allowed at the hearing, except by ſpecial order. And there being the ſame queſtion in both cauſes, and defendants defence being the ſame, the depoſitions in a former cauſe ſhall be read againſt him. But depoſitions in another cauſe, in which the matters in queſtion were not in iſſue, ſhall not be read. So depoſitions taken in a ſuit betwixt other perſons, are not to be given in evidence; for he had no opportunity to croſs examine them. So depoſitions taken in a cauſe; where the plaintiff's father was a party to the ſuit, being in all matters the ſame, his father being only tenant for life, thoſe depoſitions

2 Vern. 447.
1 Vern. 413.

depoſitions could not be read againſt him; for the
1 Ch. Ca. 175. advantage ought in all caſes to be reciprocal. And where a cauſe is diſmiſſed, the matter of it not being proper for Equity to decree, yet the fact in this cauſe proved may be uſed as evidence between the ſame parties, whenever it ſhall come in queſtion again. But when a cauſe is diſmiſſed, not upon this ground, but for irregularity, ſo that in truth there was never regularly any ſuch cauſe in the court, and conſequently no proofs, thoſe proofs cannot be uſed: For proofs cannot be exemplified without bill and anſwer, nor can they be read at law, unleſs the bill upon which they were taken can be read. *Laſtly*, No depoſitions ought to be allowed which were not taken in a Court of Record. And they are like examination of witneſſes: So that altho' the defendant may read what part he will, yet the other ſide may read the whole afterwards.

Sect. 3. And altho' all exhibits proved by the depoſitions may be read at the hearing; yet they muſt be ſhewn forth in Court if the party will have
*P. 124. any benefit of them. And * parties and privies ought to ſhew the original deed; for every deed ought to prove itſelf, and be proved by others; but ſtrangers to the deed, and who do nothing in right of the grantee, as bailiff or ſervant, may plead the patent or deed without ſhewing it. So a Will which is the plaintiff's title muſt be ſhewn to the court itſelf, and not a copy only; otherwiſe, where it is by way of circumſtance. But where a deed or other evidence is ſuppreſſed, the court will always intend a title againſt him that ſuppreſſed it. But a copy of a deed, ſuppoſed to be ſuppreſſed, is not allowed unleſs examined, nor even upon affidavit that plaintiff had got it, but he ſhall be left to recover it at law. So altho' a recital of a leaſe in a deed of releaſe is good evidence of ſuch leaſe againſt

againſt the releaſor and thoſe that claim under him: Yet as to others, it is not without proving there was ſuch a deed, and that it was loſt or deſtroyed. And in caſe of an inrolment for ſafe cuſtody, the deed may be ſaid to be recorded, and a copy of it is no evidence. Nor is the inrolment itſelf without particular circumſtances to ſupport it; as proving that the original deed was in the defendant's cuſtody or power, or accidentally loſt, *&c.* But where a bargain and ſale is inrolled purſuant to the ſtatute, the inrolment is a record: So that a copy of it may be read in evidence. For no raſure or interlining ſhall be intended in a record for the height and ſolemnity of it; but the ſure way is to exemplify it under the great ſeal, or at leaſt under the ſeal of the court.

2 Vern. 491.

10 Co. 95. 5 Co. 52. 1 Inſt. 225. 2 Inſt. 282. 8 Co. 8. Hardr. 118

CAP. II.

Of Averments and Parol Evidence.

Sect. 1. RECORDS, when perfect, for avoiding infiniteneſs, which the law abhors, eſtop all parties and privies from contradicting any thing apparent in the record. And a record cannot be confeſſed and avoided; as to ſay, that he was not a perſon able, *&c.* for then every record might be ſo avoided by a nude averment. But to take an averment which ſtands with the record, and which does not contradict any thing apparent in the record to the judges by conſtruction of law upon the words, the law well admits and allows of. So a deed indented is the deed of both parties, tho' they were the words of but one, for both ſeal it, and of conſequence are eſtopped by it, *viz.* in all the material and * eſſential parts, without

*P. 125.

without which it would not be good. Otherwiſe of a patent, or deed poll; becauſe the eſtoppel there is not mutual, as it ought to be. But to a deed they may plead *Non eſt factum, & pari Ratione* may confeſs and avoid it, as by coverture or the like. And altho' a deed is *prima facie* an eſtoppel: Yet they may plead or aver any matter of fact which ſtands with the words of the deed. But no averment can be taken againſt the judgment of law which appears to the judges upon view of the deed; for matter of fact is to be tried by the jury, but matter of law by the judges only.

Sect. 2. But in caſe of eſtoppels, verdict againſt the truth, or the law being founded upon an untrue preſumption, Chancery will relieve. And altho' ſuch aſſurances, as are uſed for the common repoſe of men's eſtates, Equity will not draw in queſtion. (For a fine with proclamations ought after five years to be a bar in conſcience, as it is in law; ſo ſhall it be of a common recovery for docking the entail) Yet if a fine is unfairly obtained, Equity will order a reconveyance, and the court where it is acknowledged will vacate it for error, or irregularity. Neither is a judgment at law to be pleaded in bar to a ſuit in Equity, notwithſtanding the ſtatute of 4 *H.* 4. *cap.* 22. becauſe that ſtatute meant only to reſtrain ſuch juriſdiction, as did take upon it to reverſe the judgement, as error and attaint doth, which the Chancery never pretended to, but leaves the judgement in peace, and only meddles with the corrupt conſcience of the party. And altho' it is ſaid, that the Common Law uſed ſome power to reſtrain ſuch examinations directly before any ſtatute made: Yet theſe ſeem rather to examine the manner than the very matter and ſubſtance of the thing adjudged.

1 Eq. Ca. Ab. 355

1 Eq. Caſes, 259.

Sect. 3. So in natural juſtice, deeds and writings are conſidered only as memorials of the contract, not

not as a ſubſtantial part of them; and therefore any other proof is as well, and the eſtoppel will not in Equity be regarded againſt the truth. As if a covenant be general, that he was lawfully ſeized, and there is proof, that it was declared upon ſealing, that he ſhould undertake for his own act only, he ſhall be relieved. So if in the purchaſe of a manor, a copyhold being a little before eſcheated, was not intended to paſs in demeſne, and was left out of the particular: Yet the conveyance was ſufficient to paſs it at law, the vendor ſhall be relieved in Equity. So where a leaſe for years was made in truſtees, precedent to the * wife's ſettlement, only to protect the wife's eſtate againſt the violence of the times, and not to exclude the huſband, but the ſequeſtrators; upon proof of this by one ſingle witneſs of an undoubted reputation, the nature of the caſe requiring ſecrecy, Chancery will relieve againſt the truſt expreſſed in the deed. And in caſe of a ſurrender made by a ſteward of a copyhold, if there be any miſtake there, that is only matter of fact, and the courts at law will in that caſe admit an averment, that there was a miſtake, *&c.* either as to the lands or uſes.

* P. 126.

Sect. 4. As for a teſtament proved *ſub ſigillo Epiſcopi* it is no eſtoppel. Yet the laſt will of a man is looked upon as the laſt ſerious act of his life, as to the diſpoſition of his eſtate, and muſt be admitted ſufficient to repeal all former wills, and much more to control all parol declarations. It is to be conſidered therefore, as it ſtands upon the will alone, and would have been ſo, even before the making of the ſtatute of frauds and perjuries. For by the ſtatute of wills, by which men are enabled to make wills, and deviſe their lands, it muſt be a will in writing, and ſhould parol proof be admitted, it would introduce a mighty incertainty and an infinite inconvenience.

5 Co. 68. 8 Co. 185. Keilw. 49.

Sect. 5. But this rule has received a diſtinction,

2 Vern. 95, 98, 337, 625. 1 Eq. Ca. Abr. 230. which has greatly prevailed, *viz.* between evidence offered to a court, and evidence offered to a jury. For in the laſt caſe, no parol evidence is to be admitted, leſt the jury might be inveigled by it; but in the firſt, it can do no hurt, being to inform the conſcience of the court, who cannot be biaſſed or prejudiced by it. And therefore, tho' ſuch an averment could not be admitted, where it was to make the party a title; yet where it was only to rebut an Equity, it might. As where *A.* charged his real eſtate with payment of his legacies and debts, and deviſed his eſtate ſo charged, to the defendant his nephew, and made the plaintiff his wife executrix. Proofs may be admitted that it was *A.*'s intention, that ſhe ſhould have the perſonal eſtate clear of the debts. And if it were taken from her by the creditors, ſhe ſhould come in as a creditor on the real eſtate. So where a money-legacy given to an executor ſhall exclude him from the ſurplus, the preſumption being that the teſtator did not intend him all and ſome: Yet ſuch preſumption may be ouſted or taken away by a proof of the teſtator's intention, that his * executor ſhould have the ſurplus, or that his next of kin ſhould not have it, eſpecially if a ſpecifick legacy were given to the next of kin, for one may aver the truſt of a perſonal eſtate. So the conſtruction of making a gift a ſatisfaction, has in many caſes been carried too far; it is therefore reaſonable in ſuch caſes to admit of parol proof as to the teſtator's intention. However the later reſolutions have been very cautious of admitting parol evidences, becauſe they encourage ſuits and litigations and introduce the very miſchiefs that the ſtatute intended to prevent.

2 Vern. 252. 1 Eq. Ca. Ab. 230.

2 Vern. 648, 736.

1 Eq. Ca. Ab. 245. 2 Vern. 648. *P. 127. Talbot's Caſes, 240.

1 Ch. Ca. 196 2 Vern. 593, 594.

2 Bac. Abr. Law, 311, and the caſe of Selwin and Brown. Talb. 240.

Sect. 6. But altho' no proof ought to be received to ſupply the words of a will, ſince the will that muſt paſs the land muſt be in writing, and muſt be determined only by what is contained in the written will: Yet there can be no hurt in admitting collateral

collateral proof to make certain the person or the thing described. As where *A.* devised to *B.* lands of 60 *l. per annum*, paying 100*l.* which he by bond owed *J. N.* It happened that the 100 *l.* by bond was not due to *J. N.* but to *S. H.* but the person who drew the will having swore, that the testator intended the debt to *S. H.* the devisee of the lands, shall be liable. So to ascertain the thing, notwithstanding the statute of frauds; for it neither adds to nor alters the will, but only explains which of the meanings shall be taken. Yet some have doubted, whether they could read witnesses on a will of lands by the statute, tho' it were only in preservation of the devise. But to be sure, if the devise would admit of any sense, they could not be read. 2 Vern. 593. 2 Vern. 517. 1 Eq. Ca. Ab. 230, 231.

Sect. 7. And it is a settled rule in the Court of Chancery, that altho' they will read parol proof to fortify any natural construction that arises from the words of the will: Yet they will never read any parol proof to make any alteration in the will, or addition to it. And if the bequest cannot be made out but by the parol disposition of the witnesses, there being only initial letters for the names of the legatees, as it is not substantive in writing, it is not a written but nuncupative will, and therefore without the circumstances required by the statute is void. 2 Vern. 68, 317. 625. 1 Salk. 234. 1 Eq. Ca. Ab. 404.

CHAP. III. *P. 128.

Of Discovery.

Sect. 1. IN the Law of Nature, when deeds and undeniable instruments cannot be produced, they must then give judgment according to the testimony of witnesses, or with consent of the other party give him his oath. I say with the consent of the other party; for else in the liberty of nature, no man is obliged to put the issue of his cause upon another man's conscience. And in the

Civil Law, the Judge *ex Officio*, if he ſaw occaſion might put the defendant to his oath, or the party intereſted might demand it. And this was deciſive between the parties and their repreſentatives, but did not hurt a third perſon. So in Chancery, tho' witneſſes are examined, yet you may afterwards examine the defendant. And a bill lies there for the diſcovery of an eſtate by one who had a title to it; as by the patentee of the goods of a felon, or of one outlawed, for outlawry is in nature of a gift or judgment to the king. So where *A.* obtained judgment againſt *B.* and the defendant to defraud him of the benefit of it, aſſigned his eſtate to truſtees for himſelf. *A.* may have a diſcovery, tho' it is objected, that this is in the nature of a foreign attachment, and that there could not be a diſcovery of a man's perſonal eſtate in his life-time. But if the plaintiff in ſuch caſe has not taken out execution, it will not be allowed. And it ſeems agreed, it would not lie againſt the debtor himſelf, nor to have a general diſcovery from a third perſon, but only for particular things. So where a fire happens in a man's houſe, and burns his neighbours likewiſe, altho' he is liable to damages at law, yet the plaintiff in ſuch caſe ſhall not be aſſiſted in Equity; for tho' the law gives an action, yet it does not ariſe out of any contract or undertaking of the party. But the caſe is not parallel, where a lighter is overſet by negligence of the lighterman, or a ſhip takes fire by the negligence of the maſter or ſhip's crew, theſe come within the reaſon of any common carrier, and therefore he ſhall have a diſcovery to enable him to bring his action. Yet a plaintiff is not admitted to a diſcovery without verifying his title at law. So that if there be a full anſwer given to the thing in demand, till that be tried, the defendants are not bound to diſcover. As in a bill for tithes, if they plead the ſtatute of 13 *Eliz.* *cap.* 20. againſt non-reſidence in bar: Or in caſe of

Carey 1. Hardr. 22. 1 Vern. 398 399.

Ibid. 1 Eq Ca. Ab. 132.

2 Vern. 442, 443.

Ibid.

*P. 129.

of tithes of conies by cuſtom, if they deny the cuſtom. And the rather, becauſe the demand was againſt common right, and if it ſhould be otherwiſe, the defendant by a feigned ſuggeſtion might be forced to diſcover any thing. But if in that caſe, the matter be found againſt the defendant, he ſhall after be examined upon interrogatories. But where there is no ſuch great inconvenience, as upon a bill againſt an executor to diſcover aſſets, he muſt anſwer, tho' he denies the debt, becauſe it concerns the act of another.

Sect. 2. As to the difference of the perſons, for whom and againſt whom a diſcovery will be admitted, it is to be obſerved, That perſons who claim lands by a will, or any other voluntary diſpoſition, having the law on their ſide, are entitled as againſt an heir at law to a diſcovery in Equity of deeds relating to the eſtate, and to have them delivered up; otherwiſe the heir might defend himſelf at law by ſetting up prior incumbrances, and by that means prevent the trying the validity of the will. So where a will concerning a perſonal eſtate is proved in the ſpiritual court, another having a former will in his favour may bring his bill to diſcover by what means the latter will was obtained, and to have an account of the perſona leſtate, and whether the teſtator was not incapable and impoſed on, tho' objected that it belonged to the ſpiritual court only to prove the validity of the will, and the former will was not proved in the ſpiritual court, as to the will in his favour was. But if a bill is brought by a remote heir for a diſcovery of a title, and evidence, and to have terms removed, and the title at law cleared, this is one of the hard caſes at law, where Equity will not aſſiſt; for as Equity will not relieve the children, ſhould the remote heir recover, ſo neither will it aſſiſt the remote heir.

Sect. 3. And the purchaſers ſhall not diſcover to impeach or weaken their title; for by this method all

all purchaſes might be blown up. As whether in
2 Vern. 463. a mortgage made by *A.* to *B.* which had been aſſigned to the defendant, there was not ſome truſt declared for the benefit of the plaintiff, tho' plaintiff charged in his bill, that ſuch a leaſe in defendants cuſtody mentioned it; for this is but a ſide wind to make a purchaſer expoſe his title, and the court will not do it, unleſs the plaintiff makes ſome proof towards falſifying his anſwer to induce them
2 Vern. 255. to it. So an aſſignee of a leaſe ſhall not be * forced
* P. 130. to diſcover whether the leaſe was expired. So there is no reaſon to compel one whoſe lands lie contiguous to mine, to diſcover the boundaries in his deeds; for that would be to help a man to evidence to evict another of his poſſeſſion. And they will never help the iſſue againſt a purchaſer. But where it is a bounty, as a voluntary deviſe to the wife for life, in ſuch caſe the heir having a good title, *viz.* as heir in tail to his great grandfather, or the like, ſhall be aided.

Sect. 4. But with reſpect to the perſonal eſtate there is a difference between contracts that are negotiable, and ſuch as are not, or where they are not negotiated in a mercantile way, where the note paſſes as ready money. As if it were aſſigned as a collateral ſecurity for a debt already contracted; for there, if the note was fraudulently obtained, or or by gaming, he has no remedy againſt the drawer. But if he actually negotiates it for value, the indorſee ſhall in all events, have his money of the drawer, tho' he has paid it before, or it was obtained by fraud; becauſe the indorſee has a legal right to the note, and a legal remedy at Law, which the Court of Equity ought not to take away from him, and it would be to the ruin of all commerce, if the original cauſe, and conſideration of ſuch note ſhould be inquired into. But the aſſignee of a choſe in action has no remedy at Law, or right to ſue in his own name, and has only a equitable remedy. And this fails, when the bond or covenant is obtained

tained by fraud, or the obligor has a legal diſcharge, as a releaſe upon payment of the money. So if the bond were aſſigned for value before payment, there an equitable intereſt paſſes, and in ſuch caſe if the obligor pays the money to the obligee, and cannot plead ſuch payment at Law, a Court of Equity will not interpoſe to aſſiſt him. But if he can, Equity will not interpoſe to aſſiſt the aſſignee.

Sect. 5. In the Civil Law the oath was only to be tendered in civil matters, when the facts and circumſtances may render the uſe of an oath juſt and decent, and not in criminal matters, any more than in the Law of *England*. And it is a ſtanding rule in Equity, that no one is bound to betray himſelf. For it is the buſineſs of Courts of Equity to relieve againſt, not to aſſiſt forfeitures, and by Law no one is bound to diſcover any matters which tend to ſubject himſelf to penalties or forfeitures, As a penal clauſe in an act of * Parliament or in a deed, tho' ſaid it was not a penalty, but part of the contract. But otherwiſe, if he covenants not to plead or demur to any bill, which ſhould be brought againſt him in Equity, or the plaintiff waves the penalty. And ſuch pleas ought to have the greateſt ſtrictneſs and exactneſs as tend to the ſupport of wrong doing. And in ſome caſes, even for a treſpaſs, a bill is proper enough in this Court, *viz.* where by the ſecret contrivance of it, it cannot eaſily be proved. As if a man in his own ground digs a way under ground to my mineral, and the like. So in caſe of a bill by the *Eaſt-India* company for a diſcovery and to prevent an interloper's trading to the *Eaſt-Indies*, there is a great difficulty as to the proof, the matter for the greateſt part having been tranſacted in the *Eaſt-Indies*, and therefore the plaintiffs ſetting forth, that they were willing to wave the forfeiture, ſhall have a diſcovery. So where the charge is not by way of treſpaſs, but under colour of title, as that defendant by colour of ſequeſtration by the committee,

1 Eq. Ca. Ab. 77, 78.

*P. 131.

mittee, had ſeized ſeveral tithes, &c. due to plaintiff, the plaintiff may pray a diſcovery of the particulars ſo taken, and their value. So where a man by colour of a title enters into an houſe, &c. and poſſeſſes himſelf of the goods, &c. for it may be impoſſible for the plaintiff to diſcover the particulars without ſuch bill. So where a will is proved, and the precedent adminiſtration revoked, ſuch bill is uſually neceſſary for the diſcovery of the goods: And yet in ſtrictneſs of Law there was a treſpaſs.

Mardr. 182.

Sect. 6. And when this Court can determine the matter, it ſhall not be an hand-maid to other Courts, nor beget a ſuit to be ended elſewhere. And therefore where a trial at Law was preſſed for, whether there was a new publication or not; it was ſaid, the cauſe muſt properly end here, and where the Court has juriſdiction as to the end, it muſt have likewiſe as to the means. And if the Court is fully ſatisfied, as to the evidence, they will not ſend it to a trial at Law at all.

2 Ch. Ca. 200, 201.

Sect. 7. For an iſſue at Law is a feigned iſſue in an action upon the caſe directed by the Chancery for the better informing and guiding the conſcience of the Court. And therefore no iſſue ought to be directed to try a matter fully proved in the cauſe. So where the proof of deeds is very plain, it would be dangerous to direct an iſſue to try the reality of them. Neither is it proper to direct an iſſue, whether there be a truſt or not, eſpecially where a truſt appears by implication from the nature of the caſe. And regularly an iſſue ought not to be directed to try a title not alledged in the plaintiff's bill. Yet if upon the hearing a matter not in iſſue does appear to the Court which goes to the very right, the Court will ſometimes order an iſſue at Law to try it, and decree thereupon. And iſſues are frequently directed where matters of Law are mixed with matters of fact; becauſe the judges can explain to the jury what the Law would be, if they ſhould find the facts.

P. 132.

FINIS.

Ex. 4. a. a.